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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

IN THE

# HIGH COURT OF ADMIRALTY,

DURING THE TIME OF THE

RIGHT HON. SIR CHRISTOPHER ROBINSON.

AND OF THE

RIGHT HON. SIR JOHN NICHOLL.

BY JOHN HAGGARD, LL.D.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

VOLUME III.

1833-1838.

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**J U D G E S**  
**OF THE**  
**HIGH COURT OF ADMIRALTY,**  
**&c. &c.**

During the Period comprising in this Volume.

---

**JUDGES.**

**THE RIGHT HONORABLE SIR CHRISTOPHER ROBINSON.**

(31st May, 1833.)

**THE RIGHT HONORABLE SIR JOHN NICHOLL.**

**KING'S ADVOCATES.**

**SIR HERBERT JENNER.**

(4 November, 1834.)

**SIR JOHN DODSON.**

**QUEEN'S ADVOCATE.**

**SIR JOHN DODSON.**

**ADVOCATES OF THE ADMIRALTY.**

**JOHN DODSON, LL. D.**

(4 November, 1834.)

**JOSEPH PHILLIMORE, LL. D.**

1.8  
3.8

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## UPON APPEAL.

DONNA BARBARA, (see vol. ii. p. 366,) reversed (a).

(a) See Appendix C.





## REPORTS OF CASES

DETERMINED IN THE

# HIGH COURT OF ADMIRALTY.

\* KENNERSLEY CASTLE.

[ \* 1 ]

February 28, 1833.

The owner having abandoned, a substituted master (whether appointed by the underwriter's agent, or by the owner's agent, or by both, not appearing,) gives a bottomry bond to a holder of a collateral security. Bond sustained. <sup>1</sup> *Quere.* Whether if a substituted master were appointed by underwriters alone, he can give such a bond?

Costs against the assignee of the owner (who intervened) not given.

THIS vessel, very shortly after she had sailed from Nova Scotia, on her homeward voyage, in September, 1830, met with an accident, and put into Picton. Grewcock, the master, thereupon assigned over the vessel and cargo to, or at least put them under the care of, Mr. Smith, a merchant of that island, and came to England. The owner having given notice to the underwriters of abandonment, as for a total loss, they authorized Mr. Loarey, of Newcastle-upon-Tyne, to act for them; upon which he, early in 1831, sent out Henzell, as agent to superintend the repairs, and to fit the vessel for the completion of her voyage. Henzell communicated, on his arrival, with Mr. Smith; and they made themselves responsible for the repairs. Mr. Smith alone advanced the funds. A new master, Herring, was appointed, and in a bottomry bond (executed by him to Mr. Smith) there was a recital that he was appointed by Mr. Loarey, [through Henzell] acting on the part of the underwriters. The accounts for the repairs were made out "for the ship or underwriters."

The \* bond was in the sum of 2,330*l.* 13*s.*, with interest at [ \* 2 ]

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<sup>1</sup> [As to the authority of substituted masters to give bottomry bonds, see *The Rubicon*, 3 Hagg. Ad. R. 9; *The Alexander*, 1 Dod. 278; *The Zodiac*, 1 Hagg. Ad. R. 320; *Walden v. Chamberlin*, 3 Wash. C. C. R. 290; *The Tartar*, 1 Hagg. Ad. R. 1.]

five per cent. The validity of the bond being disputed, a decree was taken out against the ship, cargo, and freight. After an appearance had been given on the part of the owner of the ship, he became a bankrupt, when his assignee intervened. There was no appearance for the owner of the cargo.

*Addams*, for the bondholder. At the time this bond was granted, the ship may be said to have belonged to no one: it was the subject of a legal question—whether the property of underwriters or owners—dependent upon the character of the loss. *Allan v. Sugrue*.<sup>1</sup> As against the owners the bond is clearly good. The *Alexander*.<sup>2</sup> The accounts are made out in the alternative, in case the underwriters should be saddled with the possession. The cargo arrived safe and has been delivered.

*Dodson*, for the assignee of the owner. The money was advanced on personal credit. No bottomry bond is good when the master can borrow money in any other way; and in this case the master was so appointed as not to qualify him to give such a bond.

*Sir Christopher Robinson*. This is a case of a bottomry bond under particular circumstances. It is objected, that the money was not lent on the security of the ship, but on the personal [ \* 3 ] credit of the underwriters; and it \* is also objected, that the repairs were not done under the direction nor by order of the master, and that he was not competent to give the bond. There is no objection, as I understand, to the fairness of the accounts.

The vessel, belonging to Mr. Temperley of Newcastle, was freighted in Ireland to bring to that country a cargo of timber from Nova Scotia; she proceeded accordingly, and having sailed on her homeward voyage on the 30th of September, 1830, struck on a rock almost at the mouth of the harbor, and put back water-logged. Surveys were taken, on which it was advised that the vessel was repairable, but as the repairs could not be done so as to enable her to sail in that autumn, before the ice closed in, it was thought proper that she should remain in dock without unlivering the cargo, and wait for instructions from the owner. The vessel was at first placed under the care of a Mr. Mortimer, but was removed by the master from him to Mr. Smith, the bondholder, who advanced money to the master, in order to repay Mr. Mortimer's disbursements. In October, 1830,

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<sup>1</sup> 8 B. & C. 561.

<sup>2</sup> 1 Dod, 278.

The Kennerley Castle. 3 Hagg.

the master came to England, meaning, it is said, to return and take charge of the vessel, after he had consulted her owner as to the repairs; but we hear nothing more of him; nor of the owner, except as I shall presently mention. The master had previously assigned the ship and cargo to Smith, in some form as a security for money he had advanced, and had drawn a bill on her owner for the amount, but that makes no part of the present demand. The next material fact is, that Mr. Temperley, the owner, on receiving advices of the accident, gave notice to \*the underwriters of abandonment of the ship as for a total loss; and on that question, involving the extent of the damage, whether amounting to a moiety of the value or not, there has been a long litigation with the underwriters, which is said not to be yet finally terminated.

In the spring of 1831, Mr. Loarey, the underwriter's agent, gave directions to Henzell, the master of one of his own ships going to Nova Scotia, respecting this vessel and her repairs; and on his arrival there, a contract was made for the repairs on the 15th of June, by Smith and by Henzell, binding themselves as answerable to the shipwright for the amount. The repairs were completed during the summer, and the ship, having taken her former cargo on board, sailed in October, 1831. The bond bears date on the 7th of that month, and was given for the amount of the repairs and for other charges by Herring, the substituted master; and it recites that he was appointed master by Loarey, as agent to the underwriters. The act on petition alleges that he was appointed by Smith, or by Henzell, under directions from Loarey, while Mr. Loarey swears that the appointment was made by Smith, acting in virtue of the assignment of the ship and cargo to him by the former master. He swears also that Herring was appointed before the principal repairs were done; and that the money was advanced not on his credit but on a reliance on a bottomry bond, which was always in contemplation. He does not specify the grounds of his knowledge or belief of these facts, but it may be assumed that they were agreeable to his instructions. This is all the court knows of the precise authority under \*which this bond was given, and it is reasonable to interpret [\* 5] the transaction according to the situation and interests of the several parties. Smith had become agent, in some sense, for the owner; the former master had so appointed him; at least, he described him as "our agent," in a letter to the owner; and the assignment or delivery of the vessel and cargo to him must be taken to have produced that effect; and if any thing is to be inferred from the conduct of the owner, it might be presumed, living as he did, in the same neighborhood, and with opportunities of communication

with Loarey, that he would concur in any thing that was proper to be done for the interest of those eventually to be charged with the ownership of the vessel and the proceeds of the adventure; and as to Smith, that the owner had adopted him as agent either expressly or virtually by his silence. If, then, Smith was in any form constituted agent, it would be unjust to divest him of that character constructively, and to suppose that he would be willing to relinquish his hold on the vessel for any thing that might be required to be done in the way of repairs, and, for the repayment of his disbursements, to rely entirely on the credit of Loarey or any other individual in a distant part of the world, and with whom it does not appear that he had any acquaintance or any previous transactions of business. So far, also, as Loarey was concerned, he may be supposed to have contemplated bottomry; for why should he wish to take more responsibility on himself than was necessary? And if he offered any collateral security against possible contingencies, which is the [ \* 6 ] utmost that is to be \*inferred from the evidence, I do not see that such an offer, in a case so beset with difficulties, would essentially change the character of the transaction.

It is proper to notice here the relation in which Mr. Loarey stood to the property. He was an underwriter, and the agent for the underwriters of this vessel, who had received notice of abandonment. I will not undertake to say precisely what is the abstract title of ownership in such a case, and during litigation; but, even during litigation, it can hardly be supposed that the right to originate measures for the eventual preservation of the property can rest in abeyance; and if the owner will not exercise it, where can it be transferred so naturally as to the underwriters? The beneficial interest devolves upon them on payment of the loss.<sup>1</sup> They have, then, all the interests of ownership; they are interested in the keeping down of charges, and in doing for the best every thing for the preservation of the property. No one could have a more equitable right to interfere, or have stood more free than the underwriters from all suspicion of interfering to the prejudice of any party; and the result confirms this mode of reasoning; for the ship is brought home, and the freight earned for the benefit of the owner and his estate. On this view of the acts done by the several parties, and the rights and interests attaching to them, (taking the direction of the repairs and the appointment of the master to have originated formally and legally with Smith, as I think I am bound to do, though mixed up with

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<sup>1</sup> See Park on Insurance, c. 6, 7th ed.

instructions coming from the underwriters, and even perhaps

\* with some contingent engagement on their part for secur- [ \* 7 ]  
ity,) how does the case stand with reference to authorities?

It has been always held, as far as I can trace the law, that bottomry bonds may be given by masters substituted and appointed abroad, and by masters by succession, such a master being the *hæres necessarius*, as he is called. Again, bottomry bonds are the creature of necessity and distress, and may be expected, therefore, to assume different shapes, which cannot be limited except by the condition of a faithful and beneficial discharge of the authority exercised in granting them, as being necessary for the preservation of property. The cases show that they are favored instruments. In *The Alexander*,<sup>1</sup> which occurred in May, 1812, a substituted master was appointed by the consignee of the cargo, by whom, also, the money was advanced. That case was much contested, as the circumstances were then novel; but the bond was supported. In *The Hero*,<sup>2</sup> March, 1817, the court, though it rejected the bond on account of other security on which the agent had relied, admitted the possibility that an agent intending to act on general credit might, under circumstances, be justified in resorting to bottomry after the advances had been made, on failure of other resources. In *The Zodiac*, so recently as in 1825,<sup>3</sup> the master was appointed by the consul, and some imputation was attempted to be thrown on the consul's motive for making the appointment to secure his own fees; but that bond was sustained. In *The*

\* Wakefield,<sup>4</sup> in July, 1829, there was a succession of mas- [ \* 8 ]  
ters, owing to a mortality which prevailed in the West Indies, who were appointed under various circumstances, in different islands, and by the agents or consignees; and some of them gave bonds for repairs done, not only by their own order, but by the directions of their predecessors; and those bonds were sustained, there being nothing to impeach the integrity of the whole transaction. Without referring more particularly to the terms of the judgments in those cases, I think myself warranted in holding that nothing which is attributed to the intervention of the underwriters in this case, essentially trenches on the principles on which those cases were decided. It is perhaps unnecessary to say what I might have held if the appointment of the master and the transaction itself had depended on the act of the underwriters alone; but if such a case should appear, in which every thing were done by such authority for the benefit of

<sup>1</sup> 1 Dod. 278.

<sup>2</sup> 2 Dod. 145.

<sup>3</sup> 1 Hagg. Ad. R. 320.

<sup>4</sup> Decided by Sir Christopher Robinson. [Not reported.]

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The Rubicon. 3 Hagg.

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all resulting interests, and under circumstances similar to those of the present case, I should be very much disposed to support it. If any thing improvident or unfair and disingenuous had appeared in this transaction, the case would have been essentially different; but considering it to stand unimpeached on these grounds, and to have been highly beneficial for the preservation of the property, I feel myself bound to pronounce for the validity of the bond. The state of commerce may become such as to induce the court to be even more liberal than hitherto in its view of bottomry bonds. It is not consistent with their character to bind them down by technical rules.

[ \* 9 ] \* The ship and freight were condemned in the amount of the bond and costs. The ship was sold, and the net proceeds did not exceed 584*l*. An application was then made for costs against the assignee of the owner personally, the proceeds not being sufficient to cover them; but this application the court declined to grant, observing that it remembered no instance of such a decree, and that there was nothing in the intervention of the assignee that was improper. The motion, however, was allowed to stand over; and in Easter term, 1834, it was renewed before Sir John Nicholl, (judge of the admiralty,) and, under the circumstances of the case, rejected.

---

RUBICON.

March 20, 1833.

A bottomry bond, given by a substituted master to the merchant who had appointed him, upheld.<sup>1</sup> In the charter-party was a stipulation that the disbursements for the ship should be made, free of commission, by "the charterer's agent," not named. The bondholder never saw the charter-party; he disclaimed any knowledge of this clause, and denied that he was agent.

UPON a bottomry bond given at Sierra Leone by a substituted master, it was further alleged, on the part of Mr. Meaburn, the owner of the ship, that the bond was not in contemplation when the advances were made; and also that the charter-party stipulated that cash for the ship's disbursements should be advanced, free of commission, by the charterer's agent. The bondholder, however, it appeared, had never seen the charter-party, and the name of the charterer's agent was not inserted.

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<sup>1</sup> [As to bottomry bonds by substituted masters, see *The Kennersley Castle*, 3 Hagg. Ad. R. 1.]

*Addams*, for the bondholder.

*Dodson, contra.* Campbell & Co. ought to \*have seen [\*10] the charter-party, and acted upon it. No bond was in contemplation when the advances were made.

SIR C. ROBINSON. That is a circumstance open to explanation. It cannot be taken as a fact entirely on the master's affidavit. I want to arrive at the substantial merits. In what way was this ship to have been supplied? It will be much if it can be shown that her necessities could be supplied by any means short of bottomry. Why did not Campbell & Co. make themselves acquainted with the charter-party?

*Addams.* It is sworn that they never saw it. There is nothing in the case that ought to prejudice a *bonâ fide* holder.

SIR C. ROBINSON. This question arises upon a bottomry bond given at Sierra Leone by Case, a master substituted,<sup>1</sup> on the death of Armstrong, the former master, by Campbell & Co., for their advances on account of the ship.

In opposition to the bond, it was objected, on the part of the ship-owner, that the money was advanced on other security, and not in contemplation of the bond; that the charter-party contained a special clause, stipulating that if money was required for the ship's expenses, it should be furnished by the charterers' agent, free of commission; that Campbell & Co. were the consignees of the outward cargo, and furnishers of the homeward, \*and might be pre- [\*11] sumed to be the agents of the charterer by whom advances for the ship were to be made; and that they ought therefore to have made them without a bottomry bond. It was also objected, that an advertisement had been made in the gazette at Sierra Leone on the 25th of July, notifying the want of money on bond to be supplied by the next morning; and the master, Case, had sworn that this was the first knowledge he had of the intention to demand a bond; that he had resisted the demand; but that Campbell & Co. said that the ship was in their power, and if he did not consent they would supersede him; that M'Cormack, a correspondent of the owner, had called the next day, and offered to advance the money if they would give more time, but that was refused. It was further objected, that a parcel of

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<sup>1</sup> See the preceding case.



rum, being part of the outward cargo, had been charged in the account as sold to one Newell, who was in fact storekeeper to Campbell & Co., and taken into their stores at 2s. 6d. per gallon, when it was worth 5s.; and that certain boatmen, for whose hire a sum of money had been charged, had received their payment not in money, but by truck in goods.

Campbell & Co. denied many of these allegations; and they asserted that they were not the agents of the charterer, that the outward cargo was shipped for individuals at Sierra Leone, to whom it was delivered, and that the freight had been paid in London; that they had received no orders to supply Armstrong with money, and that he had always promised to give a bond for the advances; that it was known to all the merchants at Sierra Leone that money [ \* 12 ] was wanted, and that Case \* had himself gone round to different merchants to obtain it; that the advertisement was only formal, and that they never had threatened to supersede the master, whom they had appointed on the recommendation of M'Cormack.

Now the whole impeachment of this transaction depends on the affidavit of Case; and I must say that he is not only in some degree discredited by his own admissions, but he is expressly contradicted by an affidavit on the part of the bondholder. It appears, also, from one of the bills, that although Case had been privy to some of the transactions of the former master at Sierra Leone, he had signed a receipt for him on the 20th of May, 1831, shortly before his death; yet he gives no account of the funds of the former master, nor of the means by which he had intended to discharge the advances. He continued also himself to draw supplies immediately on his appointment, without explaining from what funds he expected to pay for them. His affidavit seems, therefore, to be entitled to very little credit.

The ship, it appears, had been freighted by Simon Samuel, to bring a cargo of timber for which he had contracted with Forster & Co., of London, whose agents Campbell & Co. were; but both Forster and Samuel swear that they had never empowered Campbell to advance money; and Samuel, of whom Campbell & Co. knew nothing, also admits that they were not his agents; and it does not appear that they had any knowledge of the covenant in the charter-party as to the advances, and which was at first sight calculated to excite a suspicion of the integrity of this transaction. The [ \* 13 ] ship arrived at Sierra Leone in April, \* having suffered much in the mortality of the crew, and was there detained a considerable length of time, at five times the expense that was usually

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incurred. There was also a great difficulty in obtaining a crew even at very high wages. That is a fact, proved on the affidavit of Mr. Hamilton, a merchant at Sierra Leone. Newell also explains the transaction as to the rum; that it was taken into the store on the special request of the master, Armstrong, as it incumbered the ship in loading; and other merchants swear that 2s. 6d. was a fair price.

Now as to the charter-party; suppose the master had a personal credit, yet he died, and that might have ceased or failed at his death; and that brings the case within a case contemplated by my predecessor, that a merchant might change his security on a new state of circumstances, and fairly resort to a bond at last, though not contemplated in the original advances.<sup>1</sup> In this case larger expenses had been incurred than were calculated upon, and difficulties had unexpectedly arisen owing to the death of Armstrong; and it did not appear, indeed, that there had been any change of security, and that a bond was not always intended. The supplies were the proper subjects of bottomry, and the charges fair. There is therefore nothing to impeach the good faith of the transaction, nor to invalidate the claim of the bondholder; and the court accordingly pronounces for the bond, with all the incidents coupled with such a decree.

Bond sustained.

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• H. M. S. THETIS.<sup>2</sup>

[ • 14 ]

March 20, 1833.

Salvage of private treasure and government stores (lost on board a king's ship) by officers and men of the royal navy. Comparative claims of the admiral and subordinate officers. One fourth of the gross value awarded. The admiralty held entitled to repayment, out of the proceeds, for the pay, victualling, wear and tear of H. M. ships while they were employed upon such service. Upon appeal by some of the salvors, a further sum of 12,000*l.* awarded. Gross quantity of treasure recovered, 157,000*l.* The whole sum deducted for salvage, admiralty claim, and for expenses being 54,000*l.* Salvage, in its primary character at least, is personal.

THIS was a case of salvage for the recovery of the treasure sunk in H. M. S. Thetis. On the 4th of December, 1830, The Thetis, a frigate of forty-six guns, sailed from Rio de Janeiro for England, having on board, on account of sundry merchants in England, gold

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<sup>1</sup> [See *The Hero*, 2 Dod. 139, and p. 7, *supra*.]

<sup>2</sup> [See S. C. on Appeal, 2 Knapp, 390.]

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and silver bars, and other treasure of various kinds, amounting altogether in value to about \$810,000. On the following day she struck against the rocks of the island of Cape Frio, on the coast of Brazil, and after having been driven along the coast about a third of a mile, sunk. Intelligence of this loss was, on the 10th of December, by a letter brought overland by Lieutenant Hamilton of The Thetis, communicated to Rear Admiral Sir Thomas Baker, K.C.B., commander-in-chief of the South American station, then at Rio. On the 11th, the admiral, with The Clio, The Algerine, (Commander Martin,) The Adelaide, (tender attached to The Warspite, Lieut. G. Hathorn,) the launch of The Warspite, (flag-ship,) and with his own barge, put to sea for Cape Frio, but after beating about for three days returned, and on the 14th proceeded overland. Upon his arrival he found that the above-named vessels had reached the bay. The place where the frigate had sunk proved to be a small inlet, surrounded on three sides by almost inaccessible cliffs, and the depth of water was afterwards ascertained to vary from three and a half to twenty-four [\* 15] fathoms, with a \*bottom strewn with large rocks. The admiral remained at Cape Frio for ten days, during which time H. M. frigate Druid arrived; but it did not appear that in the course of those ten days any attempt was made to recover the lost property, beyond guarding the wreck, (intrusted to The sloop Algerine,) and saving any thing that might come to hand. The hull of The Thetis was at that time entire; but shortly afterwards went to pieces. While Admiral Baker was thus absent, Captain Thomas Dickinson, of H. M. sloop Lightning, who had arrived at Rio de Janeiro on the 6th of December, employed himself in obtaining information as to the position of the wreck, and other localities connected with it, also in inquiring for skilful persons, and in searching for, devising, and preparing instruments that might be useful. These were subsequently approved of by the admiral. There being no diving-bell at Rio, Captain Dickinson suggested that a bell might be formed out of iron tanks, and the admiral accordingly ordered two tanks to be furnished from The Warspite, and authorized him to purchase iron bars for the bell, and also an air pump. With the assistance of Mr. Jones, the carpenter of The Lightning, and an engineer named Moore, (who had been employed by the Brazilian government, and who was engaged by Captain Dickinson,) the bell was constructed; and also under his immediate direction, air hoses were so formed that they were used, with occasional repair, throughout the salvage operations. The bell was worked from The Warspite and found to succeed. Captain Dickinson then, upon his application, was supplied by Admiral Baker with Captain Fisher's

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watering apparatus; with some stores, a net to inclose the cove, \* which Admiral Baker had planned and caused to be [ \* 16 ] made, also with two men (from The Clio) accustomed to a diving bell, and a machinist, named Stebbing, from The Warspite; and sailed on the 24th January, 1831, with a Brazilian launch in tow.

Upon the arrival of Captain Dickinson in the harbor of Cape Frio on the 30th of January, he there found The Algerine, Adelaide, and The Warspite launch, in charge of Mr. Wood, the master of The Warspite, and upon the beach, portions of the masts and of other spars of The Thetis. A first object was to provide for the suspension of the diving-bell; and Captain Dickinson having relinquished the plan (as impracticable) of suspending it from a cable across, consulted with Mr. Ball, the carpenter of The Warspite. and Mr. Jones, and set a party to work on the 3d of February in order to form a derrick, or crane, from the spars that had been recovered. The admiral's preventer net was laid down. Tents were constructed to obviate as much as possible the necessity of the crew passing a dangerous bar in going to and fro from The Lightning to the place of operations. The Adelaide was despatched to Rio for a supply of cordage to rig the derrick; the admiral expressed himself favorable to the plan; and when the derrick was ready to be erected, sent the necessary rigging, and about seventy men to assist in erecting the machine. This work was accomplished on the 12th of April. On the 12th of February, various articles, and among them the stream chain cable, were recovered. On the 16th, Captain Dickinson gave directions for a small diving-bell to be constructed out of a one ton tank and the remains of a two ton \* tank, and The Warspite's [ \* 17 ] launch to be prepared for working it; and on the 4th of March, after a previous trial in the harbor and the arrangement of a code of bell-signals, Lieutenant Hathorn, of The Adelaide, and a companion descended to within a short space of the bottom; they remained in the bell nearly two hours, the proper working of it was satisfactorily established, and was resumed when the cove was not too agitated. On the 7th it was again lowered with two men; and in the course of a week many feet of the keel and several timbers were found, and the position of the wreck pretty well ascertained. By the evening of the 18th, a space of about 300 feet square had been examined, and the distance from the cliff to the place where Captain Dickinson had reason to hope that the treasure would be found, being now ascertained to be 150 feet from the nearest point, (which was about 30 feet beyond where the ship was stated to have sunk,) it became necessary to increase the length of the derrick, and

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from the small stock of materials, to alter also its original position. On the 31st, treasure was first recovered, and before 11, A. M., \$3,000 had been brought up; information of this event was immediately despatched to the admiral by The Adelaide. The work continued till dark, when large torches were prepared, by means of which the bell was again in operation from nine at night till two, A. M., on the 1st of April. The result of this continued labor was a recovery of \$6,326, besides upwards of 200 pounds of silver, and also some gold. By half past five on that morning the work was renewed; and after having removed rocks of various magnitudes, (in [ \* 18 ] \* the interstices of which, and under heaps of rubbish, the treasure was found,) before 11, A. M., upwards of \$4,000 dollars in value had been taken up. From this time till the 8th the bell was successfully in use by day and by torch-light as much as the weather permitted; and all the treasure which lay on the immediate surface, or could be found by a removal of the small adjacent rocks, had been discovered. By the 12th the derrick was erected, and The Adelaide was despatched to Rio with the men lent to assist in the launching, raising, and fixing that machine; and on the 21st The Adelaide again set sail for Rio with the whole of the officers and artificers of The Warspite, which, in consequence of orders from the admiral, were discharged and sent to their ship; and on the 30th returned with twenty-four hands from The Warspite, in charge of an acting lieutenant and two passed mates; these, with the launch's crew made forty-seven persons, who remained at Cape Frio fifteen days.

On the 11th of May, the derrick was brought into operation; large rocks were bored and prepared for removal; and, on the following day, a rock, estimated by admeasurement to weigh about eight tons, was removed; several other large rocks were displaced, and some treasure discovered. On the 15th, other rocks were turned over, one of them estimated at thirteen tons' weight. Treasure was then found with such success and rapidity, that, when the derrick had been worked on but eight days, \$50,000 in value had been taken up and secured. During that period, H. M. S. Eden, Captain W. F. Owen, arrived, bringing orders from the admiral to [ \* 19 ] send back the whole of the \* persons belonging to The Warspite, excepting Dewar and Littlejohns, together with the launch. Captain Owen remained at Cape Frio five days; and the construction, erection, and working of the derrick met with the fullest commendation of that scientific and enterprising officer. Captain Owen, in his affidavit, stated: — "Deponent had a full opportunity of observing with accuracy, and did observe the derrick, which,

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at that time, was stepped or fixed in a socket or excavation in the rocks, within the cove, and a few feet above the water's edge, supported at its other extremity by a chain cable, made fast above to the rocks, at the height of 150 feet or thereabouts, with various other stays, whereby the outer end of the said derrick was raised to the height of about forty feet above the sea; that deponent was at the time informed, and he believes, that the derrick was of the length of 158 feet, and had been made up of twenty-two separate pieces of spars, and put together in a masterly manner; and that the summit of the cliff had been levelled, and that holes had been worked in the granite of which the cliffs were composed, and wherein capstans and crabs were fixed, the crabs having been formed, as deponent was informed and believes, out of the stumps of the topmasts saved from the wreck; that deponent, during the same period, observed the operation of a large diving bell, which was suspended beneath a stage at the end of the said derrick; that the said bell was raised or lowered by a capstan, fixed on the summit of the said cliff; and that crabs were fixed on the cliffs at other points of the cove, to which guys were led, for the purpose of moving the head of the derrick \* from side to side; the persons employed at such [ \* 20 ] capstan being directed by a series of signals, conveyed, in the first instance, from the bell to the stage, and from thence to the platforms on the cliff, whereby the bell was hoisted, lowered, or moved in any direction, at the will of the persons therein; that deponent also observed that the service of working in a diving bell in the cove, at a depth of between five and six fathoms, was one of considerable risk, and always of great labor and exposure to danger, the action of the sea in the cove being for the most part heavy, on account of the cove lying open to the ocean; that the construction, rigging, and working of the derrick greatly excited the admiration of deponent; and deponent, who has been for forty-four years in continued and active employment in his Majesty's service, is of opinion that the aforesaid works and operations do infinite credit to the talent, zeal, and seamanlike tact of the individual under whose orders and directions the works and operations were carried on and accomplished, and that the erection of the derrick is viewed by this deponent, under the great disadvantages of the locality aforesaid and very limited means of effecting the same, forms a work which under such circumstances could only have been performed by British seamen, and certainly has never been equalled within his knowledge; and that he observed that every person employed in the salvage service gave his utmost exertions with admirable cheerfulness in furtherance of the same." Captain Owen supplied Captain Dickinson with the fire-engine

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of The Eden to be altered into an air-pump ; and then sailed  
[ \* 21 ] \* with \$124,000, consigned to the Bank of England, being  
the first shipment of the specie that had been received.

On the 18th of May the wind came on to blow from the south, and gradually increased, till early on the 19th it blew such a gale that the spray beat over the heights, and Captain Dickinson after watching the effects of the sea upon the derrick for upwards of a dozen hours, experienced the mortification of its being broken off at about twenty feet from the keel. This disaster had been foreseen in some measure, and in a few minutes after, while several hands were employed in saving rigging from the derrick, others were employed in preparing the localities to receive a suspension cable. (This suspension cable was stated by Captain Dickinson to have been entirely different from that designed previously to his leaving Rio.) On this occasion the first lieutenant, Mr. Delafons, nearly lost his life. He ventured down one of the cliffs to fasten a rope to a guy of great importance, and just as he had accomplished it, a sea struck him and beat him from his position ; but he fortunately caught hold of the guy, and managed to cling fast until those above threw him a rope, which having made fast to himself he was hauled up and rescued. On the 20th Captain Dickinson sent him over land to inform the admiral of the accident to the derrick, and of the device of the suspension cable. Much of the gear and spars of the derrick were saved, and with the assistance of some carpenters from Cape Frio the Brazilian launch was fitted with the small air-pump and the diving-bell. Dewar descended in it, but the hose suddenly bursting, the bell  
[ \* 22 ] filled, and he was \* obliged to swim to the surface, when he was taken up in a very bruised and dangerous state. On the 30th all the boats were in the cove. Mr. Pope was in command of the bell-boat, and the work was going on with great success until early in the afternoon, when the wind, without the least warning, set in from the westward, and in a few minutes there was a terrific sea. The boats ultimately regained the harbor in safety ; and on this occasion the officers and men, particularly Captain Dickinson and Mr. Pope, displayed much promptitude, fearlessness, judgment, and presence of mind, and skill. Until the 10th of June, the weather did not admit of the operations in the cove being resumed ; in the mean time the launch had been raised a streak, and her bottom strengthened so as to give her stability to bear the weight of the bell in a rough sea. On that day, after being occupied a few hours in clearing away the rubbish, they recovered upwards of \$30,000 ; and on the three following days more treasure was raised, and they also took up a large quantity of shot, iron ballast, and other articles of iron and copper ;

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and removed some rocks. On the 19th, H. M. packet Calypso arrived, and having received on board \$127,000, sailed for England. It was not till the 29th that the work in the cove could be resumed, when upon the removal of a large rock, treasure to the value of \$33,000 was taken up. During the first week in July, Captain Dickinson, from the state of the weather and of his health, and to keep The Lightning fit for the general service of the station, was on board. A capstan, sent by the admiral, was placed on the main cliff; he also at this time \* supplied a large net, by which the men [ \* 23 ] got a supply of fish, which was very serviceable. On the 8th a good deal of treasure was found. On the 11th, Mr. Linzee, mate of The Adelaide, two of the men, a boy belonging to The Lightning, and Moore, the engineer, who had only recently returned from Rio, were lost by the upsetting of the long-boat in crossing the bar. Prior to this, not a life had been lost by casualty. The bodies were found and buried at the island. Moore left a widow, (on whose behalf an appearance was given in this cause,) and five children. Captain Dickinson, immediately upon the death of Moore, directed that his widow should be paid ten pounds a month until the service was completed; and a subscription, nearly amounting to fifty pounds, was raised by those engaged in the operations, for her relief. On the 12th, 13th, and 14th, the operations were successful; on the 23d The Adelaide arrived with an account of a revolution at Rio, and with orders to Captain Dickinson from Captain G. W. Hamilton of H. M. S. Druid, (then senior officer at Rio, in the absence of the admiral, who had been ordered to the Cape of Good Hope and The Mauritius,) to join him, after making arrangements to guard the machinery and stores.

In regard to the machinery and works on the cliff, there existed on the part of the Brazilian government much jealousy. Captain Dickinson, having selected some young gentlemen and twelve of the crew, and placed them under the command of Mr. Frederic Read, the acting second lieutenant, and supplied him with instructions, sailed on the 25th and arrived at Rio on the 30th with \$112,000 on board, which, \* on the second of August were shipped on board [ \* 24 ] H. M. S. Tribune. On the 25th The Lightning returned to Cape Frio, and found their shipmates lame and in a most pitiable state, from the insects and from ulcers, having every toe and foot and almost every hand bound up with rope-yarn and rags. They were immediately removed to the ship, put under the care of the surgeon, Mr. Dabbs, and were restored to health. The Lightning was placed in her former berth and state; the bell launch and boats recaulked and repaired, and on the 2d of September the operations in the cove



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were successfully resumed. On the 13th the suspension cable was for the first time brought into use, and treasure recovered. A quantity of recovered stores was despatched by The Adelaide to Rio; and the large bell was completed. The weather throughout that month was extremely adverse to the working of the bell, and much sickness prevailed. During October the suspension cable was much improved, and was found to be admirably adapted for removing rocks and for raising the heavy stores, such as anchors, chain-cables, and guns. On the 25th, a survey was made of the preventer net brought from Rio, when the chain-cable at the bottom was found to be broken, and the net itself destroyed. On the following day about \$96,000 were shipped on board The Lyra. During November there were but six days in which the operations in the cove could be carried on. In the early part of that month Captain Dickinson was invalided; and on the 10th, Mr. Dabbs thus wrote to Lieutenant Delafons: "Sir,—It

is with the deepest regret I inform you that Captain Dickinson is in a state of considerable danger; when he came on board The Lightning, from the island of Cape Frio, he was laboring under bronchial inflammation, the consequence of cold contracted on the island. For a day or two he appeared rather to improve, but was at this juncture attacked by a severe form of dysentery, which has hitherto resisted all the measures employed for his relief; I am not however hopeless of his recovery." This report was forwarded by Lieutenant Delafons to Lord James Townshend, the senior officer of the station, with the letter that follows—"My Lord,—Captain Dickinson being in a very dangerous state of health, with very little hopes of his recovery, has requested me to acquaint you with the same, and also to state, it is the surgeon's opinion that should he recover he will be incapable of carrying on the present service; he therefore requests you will appoint some officer to supersede him, as in case of recovery he might repair to Rio de Janeiro and be brought forward for survey in order to obtain change of climate. I also beg leave to enclose a report of Captain Dickinson's health received this day from the surgeon." In consequence of this despatch, Lord James Townshend directed the senior lieutenant of H. M. S. Dublin, "to proceed to Cape Frio by land, to take command of The Lightning, with orders, if Commander Dickinson was alive, to send him at once to Rio." Upon the arrival of that officer such a favorable change had taken place in Captain Dickinson's health, that he retained the command. Towards the close of November there were

twenty on the sick list, which number was by the end of [ \* 26 ] December, doubled. On the 22d, however, Lieutenant Delafons and Mr. Pope, the master, thoroughly surveyed the

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cove, and found in eleven fathoms five large bars of silver weighing three hundred and twenty-nine pounds. Subsequently several rocks of which one was upwards of eight tons in weight, were removed, and by the 15 of December treasure to the value of about \$30,000 had been taken up from a space not more than eight feet square. On the 31st of December, the fifth shipment, by *The Pigeon* packet, in value about \$65,000, was made.

The months of January and February, 1832, were passed chiefly in raising guns and stores; and the harbor derrick was very useful in landing them. On the 22d of January the diving-bell was found to be quite worn out; but in thirty-six hours a new one, being the fifth, was constructed. From the 5th to the 15th of February, Admiral Baker was at Cape Frio. The weather was extremely unfavorable; but he witnessed the operation of taking up a nine pounder and some chain-cable. By the 8th of March twenty-eight guns and nearly all the public stores that had been seen, were recovered, and some treasure was found in consequence of their removal, and of a quantity of rubbish; and the survey and report of Lieutenant Deschamps, who had joined in December, induced an expectation that the remaining treasure would be discovered about the capstan.

It appeared that in November, 1831, before the return of Admiral Baker to Rio, Captain Dickinson had represented to the Lords of the Admiralty that he did not conceive that much, if any, more of the treasure could be recovered; and \*connected with the [ \* 27 ] visit, in February, 1832, of the admiral to Cape Frio, a statement was made by the admiral, (but which statement was not admitted by Captain Dickinson to be correct,) in his claim before the court, "that he found Captain Dickinson and the persons engaged under him, in a state of great despondency, as to the further success of the operations, and that he addressed the diving men and others, and the work was continued." On the 6th of March *The Adelaide* arrived in the harbor of Cape Frio, bringing a despatch from Sir Thomas Baker (dated at Rio on the 2d) to Captain Dickinson of the tenor following:—

"By Sir Thomas Baker, K. C. B., rear admiral of the Red, and commander-in-chief of his Majesty's ships and vessels employed on the South American station. The Lords Commissioners of the Admiralty having directed his Majesty's sloop *Lightning* under your command to be removed from her present duties at Cape Frio, you are, on being joined by the Hon. Captain de Roos, in his Majesty's sloop *Algerine*, (a ten gun brig,) to deliver to him a written account of the present state of the enterprise under your superintendence, which account is to embrace full observations on the quantity and

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position of the public stores still uncovered in the cove, as far as you have been able to ascertain; the estimated amount of the treasure deficient of the quantity sunk in The Thetis; the peculiarities of the bottom under water, and the most probable spot where from the latest examination the deficient treasure may be expected

to be; you will, moreover, particularly explain to him the [ \* 28 ] system which has hitherto been \* pursued for carrying on the operations, and the peculiar localities which you think might be made available to the furtherance and successful completion of the work; and you will also afford him any information regarding other points of the proceedings which he may find it necessary to require for his guidance; you are to send from The Lightning to The Algerine all those men who have now been trained to and employed in and immediately about the diving-bell, and its appendages, as well as those who have been used to any particular duties in the undertaking not generally known to seamen; you will also deliver to Captain de Roos the whole of the machinery, diving-bells, air-pumps, boats, and other apparatus, for carrying on the duties at Cape Frio, and all the stores and implements connected therewith, for which the necessary receipts are to be taken, and having placed him in all respects in possession of the whole establishment, and of every information which it is conceived will be serviceable to him in performing the duties with which he is charged, you will forthwith proceed without delay in The Lightning to rejoin me at this port."

The instructions of the admiral to Captain de Roos concluded as follows:—"I conceive it to be unnecessary to impress upon your zeal and intelligence the necessity of making localities subservient, as far as possible, in accomplishing the interesting duties upon which you are about to be engaged, but you will take every reasonable precaution to advert those unforeseen disasters and accidents to which so peculiar a service must be liable. The features of the enterprise have materially changed since its first commencement; a system

[ \* 29 ] \* has been formed, which, although perhaps susceptible of improvement, has certainly so far been attended by remarkable success, and unless some decided advantage can evidently be gained by a deviation to some other project, you would, I think, do wisely to adhere steadily to the plans which you will find in operation; but at all events, no alteration of consequence must be made from the existing plans until it has been submitted to me and received my distinct approval."<sup>1</sup>

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<sup>1</sup> The extract from the "instructions" is taken from Captain Dickinson's "Narra-

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In Captain Dickinson's journal, signed by himself, the master of *The Lightning*, and the captain's clerk, a document which was before the court, the last entry was, in substance, as follows:—"March 9th, worked the bell all day, and obtained some copper bolts and articles of iron. The captain descended in the bell to survey the bottom of the cove previous to giving up the charge of the enterprise to the Honorable Captain De Roos. Recovered to-day \$517, 189 pounds 14½ ounces bar silver, 224 pounds 8 ounces plata pina, 8 pounds of old silver." "At the period of resigning the enterprise, we were working on a part in which there was a large quantity of treasure."

On the 10th of March, Captain Dickinson delivered to Captain De Roos, pursuant to the admiral's orders, a written account of the state of the enterprise, with various remarks, concluding with his "most sincere wishes that Captain De Roos might bring to a termination this great undertaking, \* with as much success and [ \* 30 ] as little casualty as it had been commenced and conducted up to the present time."

*The following is a letter from Captain Dickinson on transmitting his narrative to the commander-in-chief, Sir Thomas Baker, to be forwarded to the admiralty,—*

"H. M. Sloop *Lightning*,  
Rio de Janeiro, 10th April, 1832. }

"Sir,—I have the honor to transmit you a narrative of my proceedings at Cape Frio, while employed in the recovery of the public stores and treasure sunk in his Majesty's late ship *Thetis*, which I request you will be pleased to communicate for the information of my Lords Commissioners of the Admiralty. In describing the progress and the incidents of the enterprise, replete with difficulties and dangers never exceeded, I have been as concise as I could without the sacrifice of perspicuity. It is impossible for me to speak in too high terms of praise and admiration of those under my command. Such an undertaking could not have been carried on without a perfect union of unceasing zeal and exertion on the part of all; where these have been so eminently conspicuous, it is difficult to particularize a few without appearing invidious to many, yet I cannot refrain from noticing Mr. Charles Pope, the master, on whom a heavy share of the duty fell, with the additional charge of the extra stores. He

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tive of the Operations at Cape Frio," (to which is prefixed a concise account of the loss of *The Thetis*,) with drawings. The narrative was published by Longman & Co. 1836.

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has, throughout the undertaking, evinced ardent exertion and attention. To Mr. George Henry Dabbs, the surgeon, we are all

[ \* 31 ] \* much indebted, myself particularly so. Every soul belonging to the ship has suffered from disease in some shape or other. His perpetual solicitude and anxiety were never surpassed, and to them and his professional talents may be mainly attributed the extraordinary little loss of life that has occurred. Mr. Frederic Read, mate in charge of a watch, is entitled to my commendation ; nor must I omit Mr. Jones, the carpenter, from whose ingenuity and quickness of perception of my various plans, as well as laborious exertion in adapting them, I have derived great assistance. These officers, I trust, sir, you will be pleased to recommend for the favorable consideration of their lordships. The anxiety of my first lieutenant, Delafons, to bear a large share of the duty, induced him to persevere, when in a very ill state of health, and to this, I fear, may be attributed his death. It was with great reluctance he at length went on board the ship, when I found it necessary to order him there, where he suffered the greatest agony for about eight weeks, and departed this life at the moment of letting go the anchor in this port. He was a young man of amiable disposition and manners, and much esteemed, not only by all his shipmates, but also by all his acquaintances, and is greatly regretted. The universally steady conduct, the indefatigable and laborious exertions in periods of great danger and difficulty, and the willing promptitude with which my people have cheerfully performed their arduous duties, cannot be too much admired ; and it has been thereby that a mere handful of men have performed a work which I believe may be placed on the list of the greatest undertakings performed by the \* British navy, and which British seamen alone could have accomplished."

The conclusion of the enterprise is given in the words of Captain De Roos's narrative.

" On the 7th of March, the ship's company of The Algerine were employed in replacing the spars removed by The Lightning, and in making themselves acquainted practically with the work in the cove over the wreck of The Thetis. On the 10th of March, we took charge of the undertaking, having left, to assist The Algerine's men, fifteen supernumeraries from The Lightning, and five from The Warspite. The diving-bell was at this time worked by means of a boat, and as a very small degree of swell instantly stopped our progress, we had plenty of opportunities to make such preparations for the health and comfort of our people as suggested themselves. After, therefore, having freshened the nips of all the hawsers and cables in

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the cove, and examined and put in order all the air-pumps, &c., &c., it was our care to new thatch and whitewash the houses; arrangements were likewise made to keep up a supply of water from the village, distant two miles across the bar, as all the pools of fresh water we found completely dried up at the island. On the 16th, a minute survey was taken of the bottom, and a ground plan made, when it was observed that the form of the spot where the spirit-room had discharged its valuable contents, when the ship fell to pieces, was an ellipse, of which the major axis was about forty-three feet, and the minor thirty-one. No treasure has ever been discovered beyond the limits of this place. It was found by us to be occupied by large boulders of \*granite, the interstices between which [ \* 33 ] were filled up by guns and fragments of the wreck, mixed up with the precious metals, in most parts forming compact masses, which it was difficult and tedious to separate. All the northern portion of this space, or that nearest the rocks, we observed had been removed, and the rest searched by our predecessors. The greater part of the rocks, however, remained untouched; and on the strength of these surveys and observations, confirmed by constant subsequent visitations, we at once established a system of work, from which, to the end of our operations, we never deviated. It was this: that whether our labors proved successful or the reverse, we would clear and remove all the rubbish within the space alluded to, and its immediate neighborhood; that after this should be completed, our next object would be to endeavor to remove all the rocks, one by one, commencing by the smallest, and ending with the largest and most unwieldy. On such a system, if properly pursued, on turning the last rock it is obvious that the place would be cleared, and that our labors would terminate. On the 17th, we got up an eighteen pounder long gun. On the 19th, we experienced one of those mortifying checks from a change of wind, which, till we altered the plan we found in operation of working the diving bell, entirely and constantly interrupted our progress, discouraged the workmen, and delayed the operations. On the 28th, under circumstances of considerable swell and great depth of water, (ten and a half fathoms,) we succeeded in recovering part of a chain-cable, which, with a net attached, had been most judiciously thrown over the mouth of the cove, to prevent \* the different articles of the frigate's equipment being [ \* 34 ] washed into deep water. I happened to be in the bell on this occasion, and can testify to the quantity of heavy articles which had been arrested by this means. On the 29th, we recovered the stream anchor from under a large rock. On the 31st, we got up, by a heavy purchase, the remainder of the chain-cable. Our attention

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was now particularly turned to selecting such spots on the surrounding cliffs as were judged best for fixing our purchases to, as it was our object to trust more to these securities than either to the boats or suspension cables; and it is to this plan that I mainly attribute the non-occurrence of any accidents in our subsequent operations. When an eligible point had been chosen, an eye-bolt was immediately placed and leaded, and thus in all directions we had points to which we could direct the force of our main capstan. One of these was distant nearly 286 feet from the object to be moved, and as much as 600 feet from the capstan. On the 8th of April, having in the course of our work cleared around a long gun which was situated beneath a large rock, after various applications of our power, and the removal of three rocks, we succeeded in disengaging and getting it up. The observations which we were enabled to make at the removal of this gun, confirmed our determination not to touch the remaining rocks until all the space was thoroughly cleared around them. On the 13th, The Britomart transport arrived, when we loaded her with all the anchors and guns which ourselves and our predecessors had got up, together with many tons of recovered iron. As the trans-  
[ \* 35 ] port lay at the distance of two \* miles; and, as these ponderous articles had to cross the bar, we considered ourselves fortunate in accomplishing this duty and despatching the vessel by the morning of the 17th.

At this period we experienced considerable delay from the unfavorable state of the weather; an interval of seventeen days elapsing, from the 11th to the 28th, without the boats being able to go out; again from the 4th of May till the 16th, though the weather was moderate, still the swell over the wreck was just so great as to prevent the diving-bell from working. It was during these tedious and harassing periods that we determined to adopt a totally new system of work, and, instead of using the boats, to avail ourselves of the suspension cables which had hitherto been employed only to get up guns and heavy articles from the bottom. The small diving-bell had never been suspended to them. On the 16th, we moved a large rock (9 feet by 5½) and discovered beneath it a quantity of treasure. The 22d was the first day on which we tried the effect of the cables, and in the afternoon in a south-west wind and considerable swell, the divers succeeded in bringing up some treasure and bars of silver. Before this, even the probability of a south-west wind coming on would have deterred us working from the boats. The gain in time, the security, and above all, the steadiness below the water, obtained by the use of the cables, now every day became more apparent, and gave fresh spirits to all employed to go through with the remainder

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of the work — the removal of the large rocks, whose size was now fully developed. On the 29th and 30th, great inconvenience and delay having been experienced by the distance (two miles) at which \* The Algerine was moored, on the farther side of [ \* 36 ] the bar, we shifted her round and anchored opposite our huts, and at not more than four cables' length distance from the wreck itself; this much facilitated our operations. On the 15th we tried the bell in a heavy swell, and succeeded in recovering some treasure, but we found the wash very great at the bottom; in the event of our not succeeding by purchases in moving the large rocks, our attention was now occupied in experiments in blowing and rending the granite, and I have little doubt but that, had the former method failed, we should have been able to effect our object by these means. The skill and ingenuity of our men were never more conspicuous than on this occasion. On the 22d we succeeded in moving a large round rock of about seven feet diameter the distance of about forty feet, and discovered a large bed of treasure beneath it. The stench of some decayed meat below was very distressing to the divers. A thirty-two-pounder carronade was recovered on the 26th. On the 28th we made our first great effort in removing a rock called the clump rock, from its shape. It was difficult to calculate its dimensions, but it could not have been less than forty tons in weight. Our first attempt failed. On the second, when a slight change of direction in the purchases had been given, this ponderous mass started from its position and rolled nearly forty-two feet; some treasure was found beneath it. On the 29th, the supernumeraries belonging to The Lightning left us, but as our own men had acquired a thorough knowledge of the work, we did not experience any delay from this loss. On the 1st of July, we determined to move the gun rock, which was the next in size \* greater than the clump; and after all was ready, by a great [ \* 37 ] simultaneous effort, this huge impediment was dragged from its position. The estimated weight of the stone was fifty tons. On the 4th we recovered the last long gun, which was in sight. On the 5th, in consequence of five hours' attentive survey by myself, we determined to move a large rock again, which had been turned in the early days of our operations before our system of work had been finally established, and the enormous sum of nearly \$24,000 was found beneath it. By the 21st we had completely cleared down to the granite bottom all the space occupied by these rocks, and there only remained unexamined one place which was occupied by a stone of vast dimensions. It was seventeen feet long, seven feet in average breadth, and eight feet deep, which, allowing the cubic foot of granite of 183 pounds, would make its weight sixty-three tons; but the determina-



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tion of The Algerine's ship's company was not to be daunted even by such an obstacle; and in order that we might leave no doubt or regret behind, it was determined as a last effort, at all hazards to remove it. Every impediment having been accordingly taken away in its intended path, and the declivity of the ground properly ascertained, three lewis irons were fixed in the inshore extremity, and the tackles secured by pendants to them. To give an idea of the power required, it will be enough to describe our cable purchase. A tackle was applied to the fall of a three-fold purchase, and this was led to a capstan of great force, having thirty men upon it. Happily our first effort was successful, and on the diving-bell going down, this huge stone was [ \* 38 ] found to have moved a \*considerable distance; nothing was discovered beneath it, but we had the satisfaction of knowing that no exertion had been wanting on our parts to the satisfactory accomplishment of our duty. The three following days were spent in reëxamining the bottom and in getting up the last fragments of the frigate's keelson, when finding that nothing was left of which the value or importance could warrant our remaining, having myself frequently and minutely searched the ground, and fifteen sixteenths of the property having been recovered, on the 27th of July, we quitted the Brazilian territory."<sup>1</sup>

Upon the arrival in this country of the first consignments of the treasure or bullion, the admiralty proctor arrested it as a derelict, and as such, droits of admiralty. Upon this a claim was made on behalf of the owners and proprietors; and restitution, subject to the salvage and expenses, was ordered in the usual way; and also a decree of appraisement and sale. On the 12th of May, 1832, the net proceeds of the bullion, then arrived, was reported by the deputy-marshal of the admiralty at 94,642*l.*; and the judge directed 47,000*l.* to be paid out of the registry to the claimants, on behalf of the owners and proprietors, without prejudice to any question. As further consignments arrived in England they were also arrested, and the actions in respect thereof consolidated.

[ \* 39 ] An appearance was given for Captain Dickinson, \*and the officers and crew of H. M. sloop *Lightning*, as salvors. The grounds of their claim are sufficiently obvious.

Claims were also given for Captain Talbot, and the officers and

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<sup>1</sup> \$588,801 were recovered by The *Lightning*, and \$161,500 by The *Algerine*. The government stores recovered were valued at about 2,000*l.*

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crew of H. M. S. Warspite; also for Rear-Admiral Sir Thomas Baker, G. C. B., as the principal salvor; and subsequently for the Hon. Captain De Roos, and the officers and crew of The Algerine, as salvors in respect of \$161,500. An appearance was also given for the widow of Mr. Moore, the engineer.

A claim was made by the admiralty for certain expenses, amounting to 13,833*l.* 8*s.* 7*d.*, incurred for pay, and in ropes, victualling, and wear and tear of H. M. ships Lightning, Algerine, and Adelaide. On the part of Sir T. Baker and of the owners, no objection was made to such a deduction, either from the value of the treasure, or from the salvage.

The admiral, Sir T. Baker, claimed in respect of the whole amount of treasure that had been recovered; and on his behalf it was alleged, "that he had devoted his whole attention to the originating and carrying on the arduous operations which had been performed to effect the salvage; that he appropriated H. M. ships Lightning and Adelaide *entirely* to the service, having also the assistance of The Warspite and Algerine, as well as every officer or man of the squadron who could be spared from their public duties, and who could be in any way conducive to its success; that the whole responsibility and expense of the undertaking had devolved upon him; that he engaged \* a party of cabalos, or native divers, at Rio, and [ \* 40 ] sent them to Cape Frio, at considerable cost, although circumstances over which he had no control rendered their services unnecessary; that he had great difficulties to encounter in consequence of the jealous feelings of the Brazilian government, who had, from false reports of interested and malicious persons, taken umbrage at the prolonged stay and interference, as it was called, of the British ships under the command of Sir Thomas Baker, with the island of Cape Frio; that whenever his public duties required him to visit other parts of his station, he left written and very particular directions for the prosecution of the salvage services, with orders to the senior officer, who might happen to be upon the spot, to give every facility in his power to Captain Dickinson, and the other persons engaged therein, to continue the undertaking; and that he caused insurances from time to time to be effected upon the treasure remitted to England; that thus the plan and attempt to recover the treasure originating with him, and the undertaking being carried on under his directions, and at his responsibility and risk, the whole loss in case of failure, would have fallen upon him; and that also, had it not been for the zeal and promptitude with which he applied his personal funds and credit, and the

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resources which his situation as admiral of the station placed at his disposal, the enterprise could either never have been attempted, or if attempted must speedily have been abandoned."

On the part of Captain Dickinson it was denied, "that [ \* 41 ] the admiral originated any part of the \* operations or measures for effecting the operations at Cape Frio; or that he invented or suggested the invention or construction of instruments or apparatus used in the recovery of the treasure, save the net, which, it was alleged, was not of any use. That in respect of the additional hands, a despatch to Capt. D., from the admiral, dated at Rio, on the 9th of March, 1831, was referred to; it was as follows: ' You will clearly understand that all persons, without exception, whom I may be induced to send with a view of assisting you in your present enterprise, are wholly under your control while they remain and have any thing whatever to do with your operations.' It was also alleged that in respect of any advances made or authorized by the admiral, the owners of the property were liable. It was denied, that the admiral had any difficulties to encounter in consequence of the interference of the Brazilian government; but it was admitted that certain unfounded reports having been circulated respecting a pretended forcible occupation of Cape Frio, by Captain Dickinson, and the Brazilian government having made a representation to the British minister at Rio, an inquiry was instituted after the departure of the admiral from the station, by the senior officer in command, and on the report of Captain Dickinson, and by the interference of the British minister that the misunderstanding was cleared up."

The claim of The Warspite, to share generally in the salvage, rested on the grounds of the schooner and launch belonging to that ship being occupied in the service; and that officers, artificers, [ \* 42 ] and other men, as also various stores, were \* supplied by The Warspite. The claim was not opposed on the part of The Lightning, as regarded the officers and crews of the schooner and launch, or the artificers, up to the 16th of May, 1831; but was resisted as regarded The Warspite generally, alleging that ship to have been at the Cape of Good Hope from June, 1831, till the middle of December, and that save the arrivals of the schooner at Cape Frio, up to the 21st of December in that year, no one belonging to The Warspite had been there subsequent to the 16th of May.

[The claim of The Warspite (flag-ship) to share generally was not allowed.]

It was not denied, on the part of the owners, that a meritorious service had been performed in the raising and recovery of the bullion

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or treasure ; but it was alleged " that all the several persons engaged, and now claiming to be salvors, as well officers as men, were during the whole period referred to (and still were) in his Majesty's naval service, and receiving pay as such ; that it was their unquestionable duty to proceed in their public capacity upon any service which might call for the exercise of their skill and labor, without reference to any private emolument to be derived therefrom, and more especially as the vessel in which the treasure in question had been shipped, and on board whereof it was at the time when such vessel was wrecked, was a frigate in the service of his Britannic Majesty ; and that the greater part of the preparations, alleged to have been made with a view to the recovery of the treasure, if skilfully made, must have been equally undertaken in order to regain the stores and ballast of the frigate, a service in which the alleged salvors would necessarily have been employed \* had no treasure been on board the frigate [ \* 43 ] when wrecked and lost, as she was truly stated to have been ; and that the several alleged salvors were engaged in one joint operation or service, and that the dispute between Admiral Baker and any officer under his orders, was irrelevant to the question of the amount of salvage to be paid by the owners, who ought not to have been made in any respect parties thereto ; and that it was not competent to Captain Dickinson to aver that he acted independently of his superior officer so as to be entitled to a distinct remuneration."

*Addams* and *Haggard* for Captain Dickinson and for the rest of the officers and crew of *The Lightning*, and others.

*Matcham* for *The Warspite*.

*Curteis* and *Robinson* for *The Algerine*.

*Burnaby* and *Lushington* for Admiral Sir T. Baker.

*The King's Advocate*, *Phillimore*, and *Nicholl*, for the owners.

*Dodson* on behalf of the Admiralty.

The principal cases cited were *The Aquila*, 1 Rob. 37 ; *L'Esperance*, 1 Dod. 46 ; *Elliotta*, 2 Dod. 75 ; *Baltimore*, 2 Dod. 132 ; *Waterloo*, 2 Dod. 433 ; *Vine*, 2 Hagg. 1 ; *Frances Mary*, 2 Hagg. 89 ; *Jane*, 2 Hagg. 338, and *The Jubilee*, MS., case decided in 1826.<sup>1</sup>

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<sup>1</sup> July 7th, 1826. *The Jubilee*, with a cargo of French brandy, sunk, at the end of November, 1824, in deep water, in the Queen's Channel, near to Margate Sand. After various attempts, under the superintendence of the agent of the underwriters,

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[ \* 44 ] \* SIR C. ROBINSON. This is a question of civil salvage unprecedented in amount of property, and also in respect to

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to raise the vessel and save the cargo, several smacks belonging to Messrs. Bell, of Whitstable, and to others, were engaged; their efforts were unsuccessful. In April, 1825, the four Messrs. Bell, in conjunction with W. Whorlow and J. Marlborough, ship-owners, of Whitstable, and with the assistance of a brig of 130 tons, made a fresh attempt, and this also was unsuccessful. They then adopted a plan proposed by John Cramp, who resided on that part of the coast; and to effect it, Cramp and his two brothers purchased *The Manto*, a vessel of 248 tons, and having fitted machinery on board, at considerable expense, they, on the 18th of August, commenced operations, assisted by the smacks of the Messrs. Bell. The vessel was at that time docked in the sand about ten feet. They continued their exertions (with occasional interruptions from weather) till the 19th of September, when they raised the vessel. On the 12th of October they rode her afloat, and removed her between three or four inches, when part of the gear broke and she again sunk. At this time, the wind coming on to blow very heavily, they returned to Whitstable, and delivered into the charge of the deputy sergeant of the Cinque Ports fifty-four casks of brandy, which having become disengaged from the vessel, they had secured. Having resumed their enterprise, and after encountering, throughout, great risk of life, and frequent interruption by damage to their boats and to the machinery, they, on the 20th of January, 1826, again raised the vessel, and dropped up with her about three quarters of a mile, when, in consequence of her being much torn about, and weakened by the means used to raise her, the bottom separated from the top; upon this they cleared away the chains and gear, and having ascertained that there was no more cargo on board, they in February gave up the enterprise.

There were eight principal, and thirty-eight subordinate salvors. A claim also was made for forty men, who had picked up and brought in forty casks of brandy, valued at about 4,100*l.* 14,352*l.* was the estimated value of the brandies, provided that they were sold duty free. The treasury had granted its permission for their re-distillation. The payments made and charges incurred by the salvors were put at 2,300*l.*

The prayer of the owners was, — “to refer all the charges and expenses laid out, incurred, and expended by the respective parties to the registrar and merchants to report thereon, and to make such decree in respect to salvage and expenses as the court should see fit; and to direct that so much of the brandies as would produce the amount awarded for salvage, together with the charges and expenses attendant upon the same, and the costs incurred in this cause, be sold duty free, and the remainder be delivered for their use.”<sup>1</sup>

*Phillimore* and *Dodson* were for the several salvors. They cited *The Jonge Bastian* 5 Rob. 322, in which case two thirds of the property saved had been allotted.

*Addams*, for the owners, admitted that the vessel was a derelict; and that it was a fit case for a liberal remuneration to the salvors.

#### JUDGMENT.

LORD STOWELL. This is a case of extraordinary merit of various kinds, combined together in various ways. It embraces every thing that can augment a salvage service;

<sup>1</sup> A sale, duty free, in respect of salvage, is no longer allowed. See 4 & 5 W. IV. c. 89, s. 4.

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the \* nature of the services performed. The Thetis, being [ \* 45 ] one of H. M. ships employed in bringing \* specie from South [ \* 46 ] America, sailed from Rio de Janeiro on the 4th of December, 1830, and was wrecked on the 5th, off Cape Frio, where she drifted into a cove surrounded by high rocks, and sunk with treasure to the amount of above \$810,000. The news of this disaster reached Rio on the 10th. Admiral Baker, the commanding officer of the British squadron on that station, proceeded to the spot, surveyed the localities, as they are termed, collected all the information that could be obtained, and having stationed a vessel, The Algerine, to guard the wreck, returned to Rio on the 24th.

The possibility of recovering any part of the property naturally engaged Admiral Baker's attention; and whether he was more or less sanguine in his expectation of recovering a large portion of the dollars, I cannot doubt his intention to attempt it. The subject had excited a general interest at Rio among the British officers and all other persons, and particularly in the mind of Captain Dickinson, who formed plans and constructed models for that purpose. Captain Dickinson submitted these plans and models to Admiral Baker, or he was sent for and consulted by the admiral, according to their different statements, and was eventually appointed by the admiral to undertake the recovery of the stores and specie. This part of the case has gone into a detail of particulars which is almost extravagant with respect to the supposed exclusive merit of \* originating ] \* 47 ] the enterprise, and devising the measures that were adopted.

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and I am disposed to give the utmost that the court has ever awarded. In The Jonge Bastian, two thirds were given; and I only hesitate in this instance to adopt that proportion from the little that would, I fear, be left for the owners, as the part reserved to them is not privileged as to duty. But the merits of this case are certainly of a very peculiar kind. There was constant attention, risk, ready invention, and a mechanical apparatus, contrived in a very elaborate and highly creditable way. If a person were to sit down and fancy a case of high salvage merit, he could not easily surpass the present case in all its ingredients. The owners can claim but little merit; the sum they advanced in the first instance was totally inadequate to the demand; and there was no subsequent offer of contribution. They incurred no risk and gave no encouragement to the enterprise. The vessel itself was a total derelict, and the salvors have performed a most meritorious service; the chance finders also are represented to have behaved remarkably well throughout. The court ultimately directed that the expenses and charges claimed by the salvors should be taxed; that the salvors should also have 9,000*l.* and out of that allotment pay to the forty men one fifth of the value of the goods brought in by them. The court also directed sufficient cargo to be sold, free from duty, to pay the salvage and expenses.

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The admiral suggests the use of a diving-bell, — Captain Dickinson claims the merit of constructing it from the ship's tanks; — one proposes the use of the hawse of the ship's patent pump, — the other claims the merit of supplying it; one engages Mr. Moore, a skilful engineer in the service of the Brazilian government, — the other obtains the consent of that government for his employment; the admiral, again, constructs a net made of hawsers and chain-cable, in order to inclose the cove; but that is said to have proved useless. I will not, however, pursue further the admissions and denials on these points; they amount to this — that Admiral Baker and Captain Dickinson had frequent conferences, in which various plans were suggested and considered between them; and I also refrain from dwelling more minutely on these details, because I do not attach so much importance to them as the parties themselves appear to have done. The result proves, that the admiral did every thing that an active and intelligent commander could do to promote and forward the enterprise, and that Captain Dickinson, by his ingenuity and exertions, fully justified the choice which had been made of him as the *dux facti*, or person to whom the immediate command of the enterprise was intrusted. That character was indisputably sustained by Captain Dickinson, and supersedes the consideration of many other particulars, since on that the claim of principal salvor more depends than on any ideal priority of invention or design that has [ \* 48 ] been \*strongly contested between them. Such has been the practice of this court in reference to the cases which have hitherto occurred, being cases usually of casual service. If a different class of cases should arise from the application of new processes of art or science, as this was in some degree, which may introduce larger combinations of means, and require larger resources, they must be provided for by agreement, or decided, if possible, on such principles of equity as may justify the court in presuming the agreement of the parties. Salvage, in its simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward. It is personal in its primary character, at least; and those who are so employed in the service are those whom the law considers as standing in the first degree of relation to the property and to the proprietors. This is necessary for the protection of the owner, who ought not to be burdened with artificial claims, and it is the natural mode of tracing effects to their efficient causes; for by whom can the service be said to be ostensibly performed, but by those who recover the thing, and on whom can the

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duty of restoring it lie, but on those who actually regain the possession? These are the principles on which the court proceeds in compelling restitution, when necessary, or in assigning a reward. It looks primarily to the actual salvor, and has uniformly rejected all claims founded on prerogative rights, as of the Lord High Admiral in former times, of lords of manors, \* of magistrates, and of flag officers, except with reference to assistance substantially and beneficially afforded.

I shall have other opportunities of examining the nature and quality of Admiral Baker's claim; but, after the observations which I have made, I think it not premature to say, that Captain Dickinson stands indisputably in the character of actual primary salvor; and I say it now, principally, that I may discharge from my statement of facts any asperity with which that claim may have been contested.

Another preliminary observation which I must make is, that this is a case quite out of the ordinary class of salvage cases. The very first fact shows the peculiar nature of the service, for it is not till the 24th of January, 1831, nearly two months after the accident, and one month after the purpose of recovering the stores and specie had been entertained, and the means devised in communication with the admiral, that Captain Dickinson sails from Rio de Janeiro to effect this object. In the mean time, all the assistance that could be afforded by concerted measures had been supplied. Stores and men had been furnished from other ships. The *Adelaide* and the launch of The *Warspite* were put under Captain Dickinson's command. A net to inclose the cove, and a suspension cable had been proposed by the admiral, and constructed from the public stores; and other things, to a small amount at least, had been procured at the admiral's cost.

The operations commenced on the 1st of February, 1831, by preparatory measures which appear in Captain Dickinson's journal, which \* contains an interesting narrative of the proceedings. The place where The *Thetis* was sunk was, it seems, a cove of about four hundred and fifty feet wide, surrounded on three sides by almost perpendicular rocks rising from one hundred to two hundred feet in height, and exposed on the south side to the sea, which broke into the cove occasionally with tremendous force, and raged with a fury that is described by nautical men as scarcely conceivable by those who had not witnessed it. The net projected by the admiral was extended at the outside of the wreck; diving-bells were constructed from water-tanks; the wreck was visited and examined, and her situation and position, so far as they could be ascertained, were mapped and buoyed; huts were constructed, and an encampment made for the protection and accommodation of the men,



who had to struggle with the vicissitudes of a tropical climate; and it is scarcely possible to imagine any merit of patient and persevering energy and exertion that was not sustained by Captain Dickinson and those under his command.

The diving-bell was lowered for the first time on the 4th of March, and continued to be worked for many hours together during the day, and sometimes by torch-light; and the workmen suffered much from the noisomeness of the putrescent provisions and animal substances (which had been in the frigate) through which they had to dig for several feet; they were also frequently interrupted, for days together, by the swell of the sea and by its more violent irruption; and on one occasion the bell was dashed against a rock, and the men escaped with difficulty by rising to the surface. The necessity of

[ \* 51 ] \* obtaining a more firm stage or platform than the deck of the launch, had been anticipated from the first. Admiral Baker had recommended and provided a suspension cable to be stretched across the cove, in a direction pointed out by him. Captain Dickinson, however, on his arrival, thought that plan not practicable, and did not use it, but substituted a vast crane or derrick, which he projected, and began to construct from the first day of his arrival. The merit of this invention has been disputed, like every other part of the case; but I see no reason to deny to Captain Dickinson the full merit of adapting it to this service; the construction of it occupied much time, and it was not brought into use till the 6th of May.

Captain Owen describes the derrick as being 158 feet in length, composed of twenty-two small spars, and stepped, or fixed by excavation in the rock a few feet above the water's edge; that it was supported at its other extremity by a chain cable, made fast above the rock, and at the height of 150 feet, and held by stays, whereby the outer end was raised to the height of forty feet above the sea; the bell was lowered or raised by a capstan on the summit of the cliff; crabs were fixed on the cliff at other points of the cove, to which guys were led, for the purpose of moving the head of the derrick from side to side. He says, "this machine greatly excited his admiration, and could only have been erected and worked by British seamen, and, in his opinion, founded on the experience of forty-four years of nautical service, had never been equalled for the ingenuity and skill with which it was contrived."

[ \* 52 ] I have given this description in the words of \* this intelligent and disinterested witness, (who visited the cove in the command of H. M. S. Eden, to convey some parcels of the dollars to England,) that I might be sure of doing justice to the invention, which occupies no small part of the correspondence between

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Captain Dickinson and the admiral respecting the comparative merits of their rival inventions—this derrick, and the suspension cable. Both, however, have only served to show the ardor and alacrity of their respective inventions in the prosecution of a common object; for the cable was never suspended in the way proposed by the admiral; and the derrick was worked only ten days before it was swept away by a most tremendous irruption of the sea on the 19th of May, after raising only about \$50,000. The diving-bell, however, had been worked from the launch from the 4th of March. Detached rocks of many tons' weight had been blasted or turned over, by boring and the use of lewis irons, to which handles were fastened and worked by capstans on the cliffs in various directions; and in this manner large parcels of dollars were recovered during the months of April, May, and June, which had been lodged under the rocks, and were found in masses of many thousands together.

On the destruction of the derrick, Captain Dickinson, it would seem, proposed to erect another; but that plan was disapproved of by the admiral, and discontinued; and he then resorted to the device of a *suspension* cable, formed on a different principle, and suspended in a different direction, as he explains it, from that proposed by the admiral. The works went on with great spirit and success

\*till the middle of July, 1831, during which period a corre- [\* 53] spondence was regularly kept up with the admiral, submitting for his approbation and sanction almost every thing that was done. Supplies of stores and men were required and furnished; and The Adelaide was employed almost constantly in passing between Cape Frio and Rio de Janeiro for that purpose. Early in July, Admiral Baker went on public duty to the Cape of Good Hope, which is said to have been within the limits of his station, and reports were forwarded to him there. He remained absent till the middle of December. Captain Dickinson was recalled to Rio on the 25th of July, 1831, by Lord James Townshend, the senior officer in command, and continued there till the 25th of August, during which time the works were suspended, and were guarded only by a detachment of men left for that service.

I will now state what Mr. Dabbs, the surgeon, says of the effect of the labor and fatigue on the health and constitutions of the officers and men. As the list of invalids increased, it appears that they were removed from the encampment and put on board The Lightning. This gentleman says, in his affidavit, that he was surgeon of The Lightning from the 30th December, 1830, to the month of September, 1832. He describes the huts, and the employment of the officers and men, and says "that when not prevented by sickness, and exclusive of Sundays, they were unremittingly employed in arduous and labo-

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rious services, far exceeding the ordinary duties on shipboard, both in respect of fatigue and of personal danger, whereby the [\*54] health, as well of officers as men, was \*much injured, and the numbers of sick very greatly exceeded the average proportion of invalids among crews in ordinary service, even in tropical climates." "They suffered," he says, "much from rheumatism, cholera, diarrhœa, and ulcers, occasioned by insects, called the chigres, burying in their flesh; and that the prevalence of disease and sickness was occasioned by the almost incessant employment of the men in duties of the most fatiguing and arduous nature, carried on in the open air, and exposed to the vicissitudes of temperature, almost without protection from the climate." He specifies the increase of sickness and disease in the different months; and of Captain Dickinson he says, "that his health was so much impaired in the month of November, 1831, that he was totally incapacitated for service, and was so reported by him; that he lay in a dangerous state for about three or four days, when he gradually recovered and resumed his duty, although much debilitated;" He says further, "that the health of Captain Dickinson was materially impaired, and he was suffering from the effects of his illness when he last saw him."

This concludes the description of the first period, and may, I think, be taken as fixing the character of the whole service, so far as to render it unnecessary to dwell minutely on the description of the operations during the subsequent period of Captain Dickinson's command. It may be proper, however, to continue a brief sketch of the proceedings to the end.

On Captain Dickinson's return from Rio, the works were resumed, and prosecuted with success during the months of September [\*55] and October. In \*November his health became impaired, as already described; he applied to be allowed to relinquish the command; but, on getting better, retracted that application, and was continued. Admiral Baker visited the cove on the 30th of January, 1832, and seems to have thought there was a prevailing despondency of further success, which it was necessary for him to discountenance by exhortations, and by the interposition of his influence and authority. This is denied by Captain Dickinson, as in his own exculpation; and I cannot consider the imputation of despondency, in any light, as a disparagement of his merit. If there was any difference of opinion between these two gallant officers as to the probability of further success, the result shows that the opinion of the admiral was beneficially interposed for the interest of the owners, but it casts no reflection on Captain Dickinson's zeal or judgment, since that success was for a long time doubtful, and continued very precarious even to the end. Captain Dickinson's com-

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mand ceased on the 6th of March, on the appointment of The Algerine, under the command of the Honorable Captain De Roos, to go on with the work.

Captain De Roos having received from him full information of every thing that had been done, and of every thing that might be essential to the further prosecution of the service, commenced his operations in the month of March, 1832. His narrative states, that on examining the ground, they supposed the spot where the spirit room had scattered its valuable contents when the ship went to pieces, to be confined to an ellipse of about forty-three feet in the major axis, and of thirty-one feet in \* the minor, as no trea- [ \* 56 ] sure had been found beyond those limits. This space was covered with granite boulders, between which were lodged guns and other fragments of wreck, mixed up with precious metals, and forming compact masses difficult to separate. The northern rocks had been turned over or removed; the others had not. Captain De Roos resolved, therefore, to clear away all the rubbish within that space, and to turn all the rocks; he adopted the plan of working the *the diving-bell* from the suspension cable, which hitherto had been *used only* for getting up guns and other heavy articles. Capstans were erected in proper places, in different directions, and on the 16th of May the works recommenced on a new system, as it is called, by which they were enabled to work during a wind, or in swells of the sea, that would have prevented the use of the boat. These works were continued with frequent interruptions during the month of June; and the workmen experienced, from the putrid provisions, the same annoyance as their predecessors. Large rocks of forty, fifty, and sixty tons' weight were removed; beds of treasure, as they are described, were found on some occasions; and on the fifth of July they removed again a rock, which they had turned before, and found, says a narrative, the enormous sum of \$24,000. On the 24th of July they considered that they had searched the whole space, and having cleared it to the bottom, left off work; and on the 27th they left the Brazilian territory, having recovered treasure to the amount of \$161,000 in value, making, with that recovered by Captain Dickinson, nearly \$750,000, or fifteen sixteenths of all that had been lost. So \* ended a service carried on with almost unremitting exer- [ \* 57 ] tion for eighteen months, unprecedented in its circumstances, not easily to be surpassed in merit, and unequalled, so far as I know, in the value of the property recovered.

On these facts several propositions have been advanced, with statements of the respective parties which have been withdrawn or qualified in argument so as to diminish very considerably the

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points now in dispute. The owners first denied the right of king's officers to claim salvage, and maintained that they were bound to proceed upon any service which might call for the exercise of their skill and labor, without reference to any private emolument; that Captain Dickinson was bound to obey the order of Admiral Baker, and that it was not competent to him to aver that he acted independently of the admiral, so as to entitle him to remuneration. But these topics have not been urged by their counsel, and the argument has been confined to the proper estimate of their *quantum* of reward.

Again, Admiral Baker represented himself as principal salvor, as agent appointed by the underwriters, and also as having engaged in their service as a speculator on his own private account; but I do not understand that either of these propositions has been maintained by his counsel, and it is manifest that almost every thing which he did was done by authority and in virtue of his command.

Captain Dickinson's claim stands on the more simple ground of actual salvor; but this claim rests upon some averments that are not, in my view of the case, agreeable to the facts. He says, [ \* 58 ] he was entirely dependent on his own skill and \* resources, and was in effect wholly uncontrolled in the direction of the salvage service, and never received from the admiral instructions in what manner the treasure was to be recovered. So far as it is meant to represent his acts as entirely independent of the admiral, I must say the log, and the journal, and his own correspondence describe a service of a very different kind. The history of his appointment and recalls, the demand for supplies of naval stores, and the compliance with those demands on the responsibility of the admiral, when necessary; the constant communication, if not submission of all his plans and intentions for the admiral's approbation and sanction, and the entire want of means to effect the service by his own resources alone, bespeak a case quite at variance with this averment, and quite out of the ordinary class of independent and individual service.

It is alleged also on his behalf, "that there is no principle of constructive assistance in civil salvage, and that no admiral or commanding officer of a station, not being an actual salvor, but merely by virtue of such command, has any right to claim to share in the salvage earned by, and awarded to, a ship belonging to such station." There is no difficulty in acceding to this proposition, as expressed in these terms. What is earned by or awarded to a ship will not be disturbed by secret constructive claims; but that will not exclude a claim from being propounded on behalf of an admiral on special grounds of extensive contribution of assistance; and in regard to the description of the admiral's service in this case, as mere con-

structive assistance, I think it went \* much beyond that, and [ \* 59 ] what is proposed as the test of that principle — the performance of mere official duties. I shall not undertake to define precisely what that line is, nor shall I enter into a scrupulous examination of what such an officer might be required to do in other cases. The services which Admiral Baker represents himself to have performed, beyond the disputed merit of originating and directing the service, are, that he furnished men and stores from the ships at his own responsibility, and procured some things at his own cost and credit. It is objected, however, that Admiral Baker made no considerable advances till the adventure had become productive; but it is admitted that he authorized Captain Dickinson to procure some articles to the amount 100*l.*, and we may infer from this admission what he was disposed to do if necessary. It was material also as indicating the general understanding of the parties on this subject. The admiral also made insurances, and kept up a correspondence with the underwriters in this country, and with the admiralty; and it does not appear to me that he obtained from either any funds, or assurance of indemnity. The letters from the admiralty of the 19th February, and 11th August, 1831, have been exhibited; and they imply that Admiral Baker was considered by the admiralty as intimately connected with the operations; they refer him very much to his own judgment and discretion as to what might be proper to be done, saving only, says the latter despatch, “that the public were not to be put to any expenses by the endeavors to save the treasure, beyond the use of the ship and crew, when \* the service would admit of it.” This [ \* 60 ] letter alone, if it were necessary to rely upon it, would, I think, be almost sufficient to give a special character to this service. It invests it, as to the salvors, with some degree of public authority, and imposes on the admiral the responsibility of doing what was proper, with very little assistance or direction either from the underwriters, representing the owners, or the government; and I think that responsibility was very beneficially discharged. Had there been any intrusion on the rights or interests of the owners in this act of the government, it might have been a good ground of objection on their part, and might have affected the whole question; but the contrary was the fact. The underwriters were in communication with the admiralty, and appear to have been privy to all that was done. If, then, admirals can be entitled at all, for any thing but mere personal presence and exertion, it must be for such services as these, which were infinitely more conducive to the success, than the admiral’s own personal presence could in this instance have been. The case of *The Aquila*, which has been so much relied on, seems to admit that some services

might have entitled even a magistrate, though it is not said what they should have been. It would be saying nothing to require personal service; since, then, such persons would not be distinguished from any other. The exception supposed in that case is, in my judgment, very applicable to the present, as authority for what I am disposed, on the effect of general principle alone, to hold; and on these observations I shall pronounce that Admiral Baker is entitled to

[ \* 60 ] share \* as having contributed effective assistance; and deeming it expedient, in a case of novelty, to act as far as I am able on rules and principles established in analogous cases, and thinking that the proportion allowed in other civil cases will not be unfit to be applied to this, I shall adopt the rule of the prize proclamation.

With respect to subordinate claims. The launch, *The Adelaide*, and the several detachments of men drafted from *The Warspite*, will share with the crew of *The Lightning* for the sums recovered during the time whilst they were associated in the operations. For the services performed by *The Adelaide*, after the 31st of May, to which time I understand she is allowed to have coöperated on land, I shall make a separate allowance; but as regards the claim of the captain, officers, and crew of *The Warspite*, for the drafts of men and stores from that ship, I can find no principle nor precedent on which that claim can be admitted. The interest of *The Algerine*, in respect to the sums recovered by that ship, stands on the same grounds as *The Lightning*. The claim on the part of the admiralty for the wages and victualling of the men, and for the wear and tear of the ships, has been in some degree resisted on the part of the salvors; and it is said to be unprecedented; but I do not know that it can be essentially distinguished from claims of owners for demurrage and repairs, in cases of private salvors; and such claims have constantly been allowed. The claim is more novel in form than in principle, and new classes of cases may be expected to require new rules. The

Lords of the Admiralty are but trustees for the public, in [ \* 62 ] \* regulating the employment of H. M. ships; and they must act as they think proper in regard to the terms on which they may be permitted to engage in such services as these. There is, undoubtedly, a difference between the assistance afforded in ordinary cases, by public vessels, for which nothing has hitherto been charged, and the appropriation of them with additional supplies of men and stores, to a service of this kind, for eighteen months together. I am, however, not called upon to give any opinion on this claim, as it is not opposed, but admitted, on the part of the owners and of the admiral; and I think the salvors have no reason to complain of being so supplied with the means of effecting this service.

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With respect to the principal salvor, I now come to explain the grounds on which that part of my decision will be founded. The general principles which govern the discretion of this court in such cases, and the principal cases on the subject, are too familiar to be repeated; they amount to this, that the court endeavors always to combine the consideration of what is due to the owners, in the protection of property, with the liberality due to the salvors in remunerating meritorious services. All claims of specific proportions, and particularly the distinction of derelict, have been discountenanced, and may be said, indeed, never to have existed in modern times. The practice of the last century may be described in the following few pages taken from a book of MS. notes, of the late Sir Edward Simpson, to which my predecessor often referred. "The maritime laws of England fix no certain proportion in cases of salvage, but are governed by \*circumstances of danger, hazard, [ \* 63 ] trouble, and expense of saving; an eighth or tenth, except in cases of extreme hazard, is as much as is usually allowed. Neither the Lord High Admiral nor lords of manors have any right of salvage, but only those who save. In some cases of extreme hazard, one third of the value, or one fourth, or one sixth, or one ninth, or a sum of money only on account of salvage is given." We see here expressed in general terms, all the shades of proportion that are variously applied to different cases, in combination with circumstances of value, trouble, and other considerations that may affect the estimate of reward. The terms themselves imply a principle of moderation, and enumerate the expense of saving, as a thing in some manner or other to be estimated in the allotment.

The sum which I shall allow in this case, in addition to the expenses, which have been unusually great, is 17,000*l.* equal to about one eighth of the computed net proceeds, and taken together with the expenses, to about one fourth of the gross value. I will only add, that highly as I deem the merits of the salvors, I have gone as far as my sense of justice will allow me in rewarding their services. With respect to 1,000*l.* of that sum, I have some further directions to give. I have thought it right to act on what I perceive to have been in contemplation between the admiral and Captain Dickinson, in allotting certain additional sums to persons distinguished in their peculiar operations by extraordinary labor and service. I have accordingly received from Captain Dickinson a list of twenty-two persons with different sums assigned to them, (which I adopt on his \*recommendation,) and which amount to 500*l.* Mr. Moore, [ \* 64 ] the engineer, is one of that number; he was unfortunately drowned, but not in any act of duty; he appears not to have been



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borne on the ship's books, but according to the engagement made with him by Captain Dickinson, he was to receive a warrant officer's share; which up to the time of his death might be estimated at about 100*l*. In consideration of his loss, of his service, and of his being taken out of the employment of the Brazilian government, I shall not think it too much to allow to his widow 200*l*. The Adelaide rendered various services performed after 31st May, 1831, as I understand, to the end of the whole enterprise, in going backwards and forwards in about forty trips with supplies and despatches, and keeping up a constant communication with Rio; she was also associated in some manner under the commanding officer in this service, and her crew were occasionally mustered on shore, and were, I presume, at all times liable to be so employed. These services would perhaps have entitled The Adelaide to share generally in prize. In the present case, I think it right to make some remuneration to those officers and men who were serving with or on board that schooner after the period that I have mentioned; and I fix that remuneration at 300*l*. If I had known whether there were any and what men in The Algerine standing in the same situation as the men particularly recommended for additional services in The Lightning, I should have made some special allowance to them, but by the absence of that vessel on foreign service, she has perhaps on that account sustained some disadvantage in this respect. These, therefore, are all [ \* 65 ] \* the directions that I can give on any certain grounds.

The court decreed to Sir Thomas Baker, K. C. B., such share of the 16,000*l*. as he would be entitled to as a flag officer on such a sum, to be distributed under H. M. order in council of 30th June, 1827,<sup>1</sup> and the remaining sum to and amongst the commanders, officers, and men serving on board H. M. sloops Lightning and Algerine, or under the orders of the respective commanders thereon on the salvage service, rateably, according to the value of the treasure saved by H. M. said sloops respectively, and also ratably to the said officers and men according to the periods of their respective services on board the said sloops, or under the orders of the commander thereof; the officers and men serving on board The Adelaide up to the 31st of May, 1831, sharing therein only to that period. It pronounced also for the claim on behalf of the admiralty for the wages, victuals, stores, wear and tear, to be paid out of the proceeds, together with all expenses; but rejected the claim of The Warspite to share generally.

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<sup>1</sup> Repealed. See the Order in Council and Proclamation of 3d of February, 1836.

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Upon an appeal on the part of The Lightning and of Admiral Sir Thomas Baker, a sum of 12,000*l.* was given in addition to the sum already awarded.<sup>1</sup>

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Upon the death of Sir Christopher Robinson, the Right Honorable Sir John Nicholl became judge of the High Court of Admiralty, and took his seat on May 31st, 1833.

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\* RELIANCE, Hays.

[ \* 66 ]

June 8, 1833.

A ship was freighted and insured from London to Calcutta and back; the master employed, as agents at Calcutta, G. & Co., upon whom he had a limited credit to complete a return cargo; he exhausted that credit; and took a cargo under their advice to the Mauritius; and in a series of voyages, in defiance of letters from his owners to return home, came back to Calcutta, chartered to G. & Co., who, on a fresh cargo to the Mauritius, received the freight, and for a small balance took a bottomry bond. The bond was without premium; it included the above freight. Held that, except as to the letter of credit, G. & Co. had acted as the agents and on the credit and responsibility of the master, and there being shown no absolute necessity for the bottomry bond to secure the return of the ship to England, that the bond was invalid. Costs. Bottomry bonds, given *bonâ fide* and for legitimate purposes, are to be liberally protected.

THIS bottomry bond was given on the 22d of September, 1830, while the ship was at Calcutta, to Messrs. Hunter and Gouger, there trading under the firm of Gilmore & Co., for 1,000*l.*; it stated that the ship was of 347 tons burden, and then bound from Calcutta to Port Louis in the Island of Mauritius, and from thence to London; it bound the master, his heirs, &c., &c., together with the said ship and her freight, tackle, apparel, and furniture, boats, stores, and appurtenances, and also the owners and freighters of the said ship, their executors and administrators; and was to be payable at or before the expiration of sixty days next after her arrival in London. There was no premium.

The case was argued in the first instance before Sir Christopher Robinson; when the owners contended, as they had alleged and sworn, that the accounts with the bondholder had not been signed

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<sup>1</sup> See 2 Knapp. p. 390.

at Calcutta by the master; and the owners having otherwise impeached the accounts, that learned judge directed them to be brought in, and subsequently referred them to the registrar and merchants. They reported, that the total account was 9,999 sicca rupees, less 1,852 (for insurance;  $2\frac{1}{2}$  per cent. thereon, and commission on the insurance.) The report therefore stated 8,147 *s. r.* (814*l.*) as proper to be allowed, subject however to the question, whether 6,750 *s. r.* (675*l.*) received by the bondholders for the freight to the Mauritius should be a deduction.

[ \* 67 ] \* *Addams* and *Matcham* opposed the bond, as invalid *in toto*, to the effect of the judgment. If not invalid *in toto*, the owners were entitled to a set-off to the extent of the freight.

*King's Advocate* and *Nicholl, contra* — The master had a discretion as to the employment of the ship. Mr. Hunter, one of the partners in the firm of Gilmore & Co., swears, "that he never saw any instructions, or paper purporting to be instructions from the owners to the master; and he has no reason to believe, and does not believe, that he was furnished with or acting under any written instructions from his owners, in regard to the employment of the ship; that he did not, in the course of his communications with the deponent and his partners, ever intimate that he had received any special instructions, but uniformly represented and gave them to understand that the vessel was under his entire control, and that he was authorized to employ her according to his own discretion, for the owners' benefit." And that the master had such a discretion is corroborated by Brinley, who speaks to the master having procured free mariner's indentures to enable him to trade with the ship in India, and that the owner was aware of them. The bond was required for the outfit of the vessel; the master had no credit. It would be dangerous to allow of a deduction for the freight. Gilmore & Co. were, by the usage, warranted in their application of it in liquidation of the simple contract debts — the general account against the ship; for Mr. Hunter swears, "that from his long residence at Calcutta, and the know-  
[ \* 68 ] ledge he has thereby acquired of the \* custom of trade there, he is enabled to depose, that it is the constant and invariable practice at Calcutta to receive in advance the freight for goods shipped at that port for the Mauritius, or any other place or port except for Europe."

SIR JOHN NICHOLL. This bottomry bond for the sum of 1,000*l.* was given by the master to Hunter and others, of Calcutta, trading

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under the firm of Gilmore & Co. It is drawn up much in the usual form; and states legal grounds for taking up money on bottomry in a foreign port. It, among other things, recites — “Whereas Christopher Hays hath been necessitated to take up and borrow 1,000*l.* for paying and discharging the costs, charges, and expenses of the ship *Reliance* at the port of Calcutta, and for furnishing the said ship with provisions and necessaries for the said voyage, (namely, to the Mauritius and thence to London,) and for other the uses of the said ship:” — the “other uses,” however, must be for the purpose of enabling the ship to complete her voyage; and a master is only authorized, in strictness of law, to take up money on bottomry when he has no funds or credit; he can only hypothecate the ship for an unprovided necessity.

The history out of which this question arises shows an unfortunate adventure for the owners. It appears that the ship was, in October, 1827, put under the command of Hays as a general ship, on freight upon a voyage from the port of London to Calcutta and back to London. The owners insured her out and home. They also, lest the master should not be able to get a full freight home, furnished him, in order to purchase goods, \* with a letter of [ \* 69 ] credit for 1,000*l.* from Hunter & Co., merchants of London, upon their correspondents, the Messrs. Gilmore of Calcutta; but in other respects Hays had only the ordinary powers of a master.

In May, 1828, the ship arrived in Calcutta; and the master, having this letter of credit, naturally and properly enough applied to Gilmore & Co., to act as agents for the ship, her owners not having any regular agents there. Upon arriving at Calcutta, the obvious duty of the master was to get a full ship back to London, in freight as far as he could, and the rest in goods. He was bound by his contract so to do. The obvious duty of Gilmore & Co. was, as agents for the ship, to assist the master with advice, and with funds as far as 1,000*l.*, but to that extent only, and that again only for the purpose of filling up her freight for the return voyage to London. But they had no right to employ the ship in another way; they had no right to trust to the representations or aid the schemes and speculations of the master, unless he could produce from his owners some authority; but he had no such authority; no letter of instructions; nothing that, in my opinion, ought to have satisfied Gilmore & Co. that he was invested with any exercise of discretion in the employment of the ship. If the master embarked in any speculation different from his instructions, it was his own act, and at his own peril; and if Gilmore & Co. assisted him, they assisted him on his own credit and responsibility; they then became the master's agents, and were no

[ \*70 ] longer the agents of the owners ; and as regards Gilmore \* & Co. the question is, not whether they acted fraudulently, but whether they did not become, at their own peril, the agents of the master.

The master drew bills at Calcutta on his owners, to the extent of his credit; and those bills have been duly paid. He also, at Calcutta, under the advice of Gilmore & Co., bought a cargo of rice, which he carried to the Mauritius and sold; he there drew upon his owners bills to the amount of 2,600*l.*, which they of course have refused to honor, and having purchased sugar and other articles, went to Van Dieman's Land and New South Wales; and from thence back to Calcutta. He then went to Arracan with grain, and back with salt; and after a second voyage to Arracan proceeded to the Mauritius, was there chartered back to Calcutta, and after a further voyage to the Mauritius with rice, he, in March, 1831, sailed to the Cape, and arrived in London in September following.

In all these voyages, occupying nearly three years, Gilmore & Co., at Calcutta, and their correspondents at the Mauritius, acted on the credit of the master, receiving the freight and proceeds from the sale of the several cargoes, and charging their commission. They did not act on the credit of the owners; however, for a time, they might have hoped that they would sanction what they did, for they had no communication with them, and they had exhausted the letter of credit; they did not act on the credit of the ship, for, under the circumstances the master had no legal authority to bind it; and it is

a very different thing, binding the owners and binding the [ \*71 ] ship; \* for the latter gives a priority of claim to the exclusion of other creditors. It is only in the extremest necessity that the ship can be pledged.

Latterly, indeed, Gilmore & Co. appear to have acted not only without, but against, the authority of the owners; for the owners, upon receiving letters from the master, written at Calcutta in May, 1828, and informing them of the intended employment of the ship, wrote back on the 7th of February, 1829, a letter addressed to the master at Gilmore & Co.'s, disapproving of that employment, and desiring that he would immediately bring the ship home on the best terms he could; and, in answer to a further letter, they again wrote to him at the Mauritius, insisting that he should bring the ship to England, even in ballast. It is stated in Hays' affidavit, that the letter of the 7th of February was shown to Gilmore & Co., (and this is probable,) yet they continued to employ the ship.

On the 27th of January, 1830, there is a letter from one of the parties to their correspondent in London, which states: — "The Reli-

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ance came back direct from Kyouk Pheoo without going to Rangoon, having made engagements there for a cargo of rice, which Captain Hays intends taking to the Mauritius. He was at first going direct for the rice; but we have got him a full freight for Madras, and are in hopes to procure another for him there for the other side to Maulmein. He then loads his rice and proceeds to the isle of France, where he hopes to get a freight to London; if unsuccessful, he will probably come back here with timber. We could have got him a good freight to London just now, but he preferred this \*voyage, and having no orders ourselves on the subject, of [ \*72 ] course the matter is under his direction." Therefore, according to this letter, Gilmore & Co., were in January, 1830, engaged in a speculation in conjunction with the master, and giving him full credit. The transaction is not to be considered as a matter of fraud in Gilmore & Co., but of trust and confidence in the master's credit. A further letter of the 26th of July, shows, however, that they then began to distrust him. It is subjoined to a letter of the 8th of July,<sup>1</sup> and thus begins:—"Since writing the above we have been surprised to find that Captain Hays is deeply indebted to Cruttenden, Mackillop & Co.,<sup>2</sup> and that he had promised them the security of the policy of insurance on his rice to the Mauritius; and in this has broken faith with them. After such concealment, added to such breach of promise, we have little faith in him, and we request you will be the first to obtain sufficient security, if you cannot get immediate payment of the debt."

In the mean time what passed at the Mauritius? In the month of June the master is there advised and induced by Thomson & Co., the correspondents \* of Messrs. Gilmore, to enter [ \*73 ] into a charter-party. That instrument recites:—"Whereas Captain Hays, being indebted to Messrs. Gilmore & Co. in a certain sum of money advanced by them, when The Reliance was last in Calcutta, Thomson, Passmore, & Co., as a means of assisting in the liquidation thereof, have agreed to come under the following engagement on the conditions hereafter mentioned:" and in the first of the

<sup>1</sup> This letter stated:—"Inclosed are accounts current with us of the ship Reliance, that of 8th February was signed by Captain Hays as correct, before he left this for the Mauritius; that dated 30th April, is correct to the present time." . . . "In the event of his obtaining a freight on advantageous terms at the Mauritius direct to London, we have authorized his using the balance due to us (which was otherwise to have been remitted from the proceeds of his rice cargo) to purchase sugar on his own account, to be consigned to you for sale."

<sup>2</sup> Upon the bills, drawn at the Mauritius by Hays for 2,600*l.* in favor of Saunders & Co., being returned protested, they sent them to Cruttenden & Co., at Calcutta.

conditions it is stated:—"that provided Captain Hays shall return to this port from Calcutta with a full cargo to be consigned for sale to the said Thomson & Co., they guarantee that, for each bag of rice which the ship shall land here, a freight of one sicca rupee and eight ounces shall be earned by the ship, and that, previously to his leaving Calcutta, Hays shall be at liberty to draw for such freight on said Thomson & Co."

Agreeably to this charter-party, the vessel returned to Calcutta; and the accounts between Gilmore & Co. and the master were made up to the 14th of September, 1830. A balance of 1,495*l.* was carried to a new account, besides a sum for commissions, which together made 1,532*l.*; and in that account there are many items not induced by the necessities of the ship. There was on the other side, however, a credit by the agents to the master, carried up to the 21st of that month; and among other items is a sum (675*l.*) for freight upon the fresh cargo to the Mauritius. This freight, it is said, was received according to the usage at Calcutta; but that the sum itself exceeded the necessary expenses for the homeward voyage, appears upon an examination of the accounts; yet a bottomry bond was taken, and in it this freight was included, though upon that there could

[ \*74 ] \* be no sea risk; and as to the rest, supposing all the items were on credit, and for necessities, they amounted only to 139*l.*; and the bond is for 1,000*l.* One consequence of the freight being thus received at Calcutta, was, that the master, when at the Mauritius, was obliged to take up money on bottomry from Thomson & Co.; that bond has, however, been paid; and I here repeat, that before a master can exercise the extraordinary power of hypothecation, he must show that there is an absolute necessity for it, to secure the return of the ship. No imputation of fraud attaches to the transaction; but on a whole view of the case, I cannot consider this instrument in the nature of a bottomry bond.

Bottomry bonds, where given *bonâ fide* and for legitimate purposes, are to be liberally protected. It is important for the interests of commerce that a master, in a foreign port, standing in need of assistance arising out of some unforeseen necessity, to complete a voyage, and having no credit, should for that object be invested with a power to pledge the ship, and charge upon it the repayment of the loan in case of her safe arrival; but on the other hand, it is highly necessary for the protection of ship-owners that the master's power in that respect should be limited by the necessity of the case; the transaction should be cautiously watched; for otherwise masters intrusted with valuable ships in very distant parts of the world may, in conjunction with merchants, tempted by the profit of agency and commission on all

## The Orelia. 3 Hagg.

sales and advances, employ ships for years on their own speculations and adventures; and at last, under color of advances to enable the ship to return home, grant bottomry \* bonds, thus [\*75] adding to losses and injuries already suffered by the owners, and which bonds may also be to the prejudice of creditors.

In this case, Gilmore & Co. had for three years been the agents of the master, and had made advances on his credit alone; the owners had limited them; the ship, at the time the bond was given, was chartered to Gilmore & Co., and for their benefit; and there is nothing to satisfy me that the ship was in that state of necessity as to want a bottomry bond. If a necessity existed, it was a necessity arising from the conduct of Gilmore & Co., or of their correspondents at the Mauritius. The case, therefore, is not brought within the rules of law upon which bottomry bonds are upheld, and I accordingly pronounce against the bond, and dismiss the bail. The owners are also entitled to their costs.

## ORELIA, Hudson.

June 15, 1833.

A bottomry bond, given within three days of sailing, at the Mauritius, by a part owner, the *de facto* master, to a stranger, who took no step to ascertain whether the loan was required for the purposes of the ship, such loan being larger than advertised for, and the balance in favor of the agents and consignees small — though in evidence that, till discharged, they would have detained the ship — not valid.

Whether a lender on bottomry is bound to see to the application of his loan, *quære*?<sup>1</sup> There being no *mala fides* in the bondholder, the court declined to condemn him in the costs of the assignees.

BOTTOMRY bond recited, that "William Hudson, part owner and master of the ship Orelia, (an English vessel of about 382 tons burden, and, at the date of the bond, at anchor in the harbor of Port Louis, at the Mauritius,) being in the prosecution of a voyage from London to Van Diemen's Land, Swan River, &c., the Mauritius, &c., Somabaya and Java, again to the Mauritius, and lastly thence to London, and at that time necessitated, from want of funds and the impossibility of procuring any on his own personal credit, or that of the remaining owner, to take up, upon the maritime risk of the said ship, for paying the disbursements \* on the said voy- [\*76] age, and other necessary expenses in Port Louis, and to

<sup>1</sup> [See The Jane, 1 Dod. 461.]



enable her to sail on her voyage to London, the sum of 900*l.* sterling, which sum Henry Barlow, of Port Louis, merchant, had at his request lent at eighteen per cent.; that the master bound himself, his executors, &c., his goods and chattels, and particularly the ship, tackle, and apparel of the same, and also the freight which was or should become due from the voyage from Port Louis to London, to pay to Messrs. Gower, within ten days after her safe arrival at London, the sum of 1,062*l.*" The bond was dated 15th June, 1831.

The Orelia sailed on the 20th June, and after her arrival at London was, on the 15th of October, with the freight, arrested by Messrs. Gower; she was sold by a decree of the court of the 7th of December; the net proceeds and the freight were brought in; and, after payment of the seamen's wages and expenses, there remained 829*l.*

On the first session of Hilary term, 1832, an appearance was given for the assignees of Hudson and his co-owner, opposing the validity of the bond. They stated that until December, 1831, no assignee had been appointed, and that Hudson had only recently disclosed the circumstances under which the bond had been granted.

The assignees, after denying that, at the date of the bond, the ship was in want of necessaries; that the money was advanced to procure them, or that Hudson was at the time master, alleged, "that Haliburton was at such time master, as appeared on the ship's register; that, while at Port Louis, the ship stood in need of trifling repairs only, which were done by her own carpenter and

[ \* 77 ] crew, assisted by \* two or three blacks from the shore; that no stores were there taken on board; that Hudson borrowed the money for his own private use; that he had admitted that, with 500*l.* of it he paid off a bond granted by Haliburton at Swan River, and that no part had been applied for the use and necessities of the ship, and that Barlow knew that the advances were not for the purposes of the ship."<sup>1</sup>

On the other hand, the bondholder alleged, "that The Orelia arrived at the Mauritius on the 21st of April, 1831; and on her arrival Hudson reported himself as master, and, during the two months the vessel remained there, he did all acts usually done by a master, and was so in fact and was so reputed; that Thomson, Passmore, & Co., who, as consignees of the ship, had made various necessary dis-

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<sup>1</sup> The court, on motion on behalf of the bondholder, directed the proctor for the assignees to bring in all the affidavits and proofs then in his power or possession, before the bondholder should be required to return his answer to the statement of the assignees; and upon the affidavits and proofs being so brought in, the bondholder was allowed time to send out to the Mauritius.

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bursements on her account, advertised in the Gazette, on the 28th May, for about \$3,000, to be secured on bottomry on the ship and freight; that no person applied; and on 12th June, Barlow was informed by Mr. Cookney, H. M. Procurator-General for the Mauritius, that there was an eligible opportunity of remitting 500*l.* or 600*l.* to England by a bottomry bond on the ship and freight, and he agreed to advance it; that Hudson was then a stranger to Barlow; that on being introduced to him, he said he had incurred considerable \* losses, and should require 900*l.* to get his vessel to sea, which Barlow consented to advance at eighteen per cent., in the full belief that the whole was necessary for and would be applied for the purposes of the ship, and to enable her to complete her voyage to London; and he alleged that it was so applied, and denied its misapplication; that, at the time of the advance, Hudson, as master, was indebted to Thomson & Co., for necessary supplies and stores to the ship for her home voyage, in \$3,765, being 753*l.*; to Edes in 103*l.*, who, on the 13th of June, had arrested the ship for that sum, due on a bottomry bond granted in December, 1830, to Haliburton, and by him assigned to Edes; and which sum, on the 15th of June, was decreed due, and the ship to be released on payment; and also a judgment debt of 50*l.* due to Pierson & Co., as commission for freight on the homeward voyage; that Hudson had no means of raising money for the equipment of his vessel, save by bottomry; and that he (Barlow) had since, for the first time, learned that Hudson had deposited with Thomson & Co. a quantity of rice, in part liquidation of their demand."

The assignees replied, that Thomson & Co. were the consignees, and acted as Hudson's agents; that they paid every thing; had received goods and cargo; and when the ship sailed, had rice which, after her departure, netted 300*l.*, leaving a balance in favor of Hudson, who had good mercantile credit and funds in hand; that the advertisement stated that offers would be received by Thomson & Co. on the 2d of June; and it was notorious that they were then agents, and that Barlow did \* not apply to them; that Hudson, on the day he received the money, deposited the whole with Balmano & Co. to wait his orders from England; and upon that being made known, after the ship had sailed, to Barlow, he attached the same, by which he abandoned the bond, even if good.

*Dodson and Addams* against the bond.<sup>1</sup> The ship was not in want

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<sup>1</sup> As the bond had, though *ex parte*, been pronounced for, and the assignees had

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of necessities when the money was advanced. The disbursements had been made by the consignees, and not in contemplation of bottomry. Thomson & Co. have not brought in the account current; they claim a balance of about \$900; but Barlow admits that if the account were produced, it would show a balance in favor of the ship. The master had funds or credit, or both; no necessity for a bottomry bond. Rhadamanthe.<sup>1</sup> Augusta.<sup>2</sup> Nelson.<sup>3</sup> The lender knew, or might with reasonable diligence and caution have known, that there were agents and consignees, and that the ship was equipped for sea and had had nothing expended upon her in repairs. The lender may not be bound to see to the application of his loan, but he must show that there was a reasonable ground for believing that the loan was wanted for the actual necessities of the ship. Hudson was not the registered owner.

[ \* 80 ] *King's Advocate* and *Haggard, contra*. The \* competency of Hudson to give this bottomry bond admits of no real doubt. He was certainly *de facto* master; no one else at The Mauritius was recognized in that character. That Thomson & Co. had disbursed upon this ship nearly \$4000, must also be admitted; but by the value of the rice deposited in their hands, that sum had been reduced to \$900; that balance was paid on the 20th of June, five days after the date of the bond, and no doubt out of Barlow's money. Mr. Thomson swears, that if the balance had not been paid he would have prevented the ship from sailing. If, then, the vessel might have been arrested by Thomson & Co., and detained, money taken up to obviate a detention or to release is strictly a necessity within the rules applicable to bottomry bonds. So as to claim for commission on the procurement of freight for the voyage. Treating with the master and part-owner exempted Barlow from applying to the consignees. Where the transaction as regards the lender is *bond fide*, it will be favorably regarded. It may be doubtful whether Barlow can prove under the bankruptcy. If, at least, the bond be not good to its full extent, it may be established *pro tanto*. Here was a clear necessity for \$900; eighteen per cent. was the then current rate of interest upon bottomry loans.

SIR J. NICHOLL. This is a suit on a bond of bottomry given at

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written first (in form) to the act on petition, they began; but after hearing Dodson, the court called upon the counsel in support of the bond.

<sup>1</sup> 1 Dod. 201.

<sup>2</sup> 1 Dod. 283.

<sup>3</sup> 1 Hagg. 169.

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the Mauritius on the 15th of June, 1831, for the sum of 900*l.*, with maritime interest at eighteen per cent. The proceedings have been various, and in the course of them the ship has been sold, the \*proceeds and freight brought in the registry, and out of [ \* 81 ] them the seamen's wages paid, leaving a balance of 829*l.*, a sum, therefore, not equal to the payment of the bond. It is said, that Hudson was not registered as master at the time this bond was given; but he was then, and had been at least for two months before, acting master, and in that character might, I think, bind the ship. He was, it appears, at such time owner of a moiety.

In the course of the voyages made by this vessel, she arrived at the Mauritius on the 21st of April, 1831, with a cargo of rice taken in by Hudson at Somabaya. At the Mauritius this cargo was put into the hands of Thomson, Passmore, & Co., the consignees, and the agents of Hudson, and the whole expense of the vessel was defrayed by them. It is proved that she there required very slight repairs only, and that they were chiefly done by the ship's carpenter and crew. There was no occasion then for a bottomry bond to meet those repairs; and in regard to any other disbursements, it appears by a debtor and creditor account annexed to an affidavit of Leslie, one of Hudson's assignees, that although up to the 18th of June the disbursements by Thomson & Co., amounted to \$3765, yet on that day Hudson was so far credited by them, on account of the sale and consignments of rice, and some passage-money, as to leave only a balance of \$900 in their favor, which on the 20th of June they received. Thus, up to that time, Hudson, in his character as master and part-owner and proprietor of a considerable cargo, had extensive dealings with Thomson & Co.; and there is no particular reason to \*induce me to [ \* 82 ] suppose that he was without credit. They had fully supplied whatever was required for the ship. Hudson, however, wished to raise money on bottomry, and caused an advertisement to be inserted in the Mauritius Gazette in these words:—

Saturday, 28th May, 1831.

“Wanted, to defray the necessary disbursements in this port, a sum of about \$3000, to be secured by bottomry on the ship and freight of The Orelia, burthen 382 tons, W. Hudson commander, bound for London. Offers will be received by Thomson, Passmore, & Thomson, on Thursday next, 2d June, at 12 o'clock.”

At the date of this advertisement there was a balance due to Thomson & Co.; they probably, therefore, had no objection to a bottomry bond; but it does not appear that there was then any necessity for it.

No offer was made; but on the 12th of June, in a conversation between Mr. Cookney and Mr. Barlow, the matter was accidentally mentioned, and Mr. Barlow, who was desirous of making a remittance to England, agreed to advance the money on bottomry; and from the case on a former day there seems to be no objection at the Mauritius to advance money on bottomry.<sup>1</sup> Mr. Barlow then had an interview with Hudson, who wished the loan to be increased to 900*l.*; to that Mr. Barlow also agreed; he paid the 900*l.*, and the bond was executed on the 15th of June.

[ \* 83 ] The question is, whether this bond be valid as \* against the ship. Since it was given, Hudson, and, as I understand, the other owner also have become bankrupts. If, therefore, the bond be valid, the holder is entitled to a priority over all other creditors, so far as the remaining proceeds will extend. It is, then, necessary to examine the transaction with some degree of strictness.

The law respecting bottomry bonds cannot be better laid down than in the case of *The Hero*.<sup>2</sup> It is there said, "bonds of this description when entered into fairly and *bonâ fide*, are very favorably regarded in this court. They are given as security for money advanced for the necessary use of a ship in a foreign port, where the owner and the master have no personal credit, and where, without such assistance, the ship must continue to lie until it becomes rotten and useless. It is highly expedient, therefore, that they should be upheld with a vigorous hand. The principle on which they are founded and supported is of great antiquity, and deeply radicated in the general maritime law from which it has been transplanted into the law of this country. Where the master cannot procure the necessary supplies on the personal credit of himself or his employers, there can be no doubt that he is at liberty to pledge the ship itself, by way of security, to the lender, and to stipulate for the payment of interest after a rate which, in cases of bonds granted under other circumstances, would be deemed usurious." Such is the duty of the court where the transaction arises out of an absolute necessity. But

as Lord Stowell lays down in several cases, and also in a further \* part of the case from which I have cited, the necessity must exist. He says, "It has been argued, and with apparent propriety, that a person to whom the ship is consigned by the owner, and who must be in constant correspondence with him, ought to make the necessary advances without demanding maritime interest; and it has been truly said, that a party is not at liberty to act as the agent of the owner, and at the same time to take upon himself

<sup>1</sup> *The Reliance*, *supra*, p. 66.

<sup>2</sup> 2 Dod. 140, 143.

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The Orelia. 3 Hagg.

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the character and privileges of a stranger; to act as if there were a necessity, when no necessity exists. The case of necessity, which is the foundation of a bottomry bond, does not arise where there is credit existing on which money can be obtained without resorting to the real security of the ship." Here the bond was not taken by the consignees, but by a stranger. The whole transaction was finished in three days.

It may be a question whether a lender on bottomry is bound to see to the application of the money he advances; but it is clear that he must make due inquiry to ascertain that a necessity exists, and that without money so advanced the ship cannot proceed upon her voyage. When a necessity has been ascertained, the lender may not be required to see to the application of the loan; but when a ship has arrived with a considerable cargo in a foreign port, and remains there for some time—in this instance for two months—and where the repairs have been unimportant, and all the stores furnished, and a person then advances money on bottomry without seeing to the necessity, he does it at his own risk. In giving such a bond, Hudson, as part-owner, had not—and certainly not over other part-owners—a \*greater power than a mere master; and it may [ \* 85 ] be presumed that he had a greater personal credit. Here, Mr. Barlow first agrees to advance 500*l.*, and then agrees to make it 900*l.*; and this (it is his own account) upon the statement and assurances of Hudson, and the advice and representations of Mr. Cookney. It does not appear there was any inquiry whether a necessity existed for the money, whether repairs were wanted for the ship or had been done; whether any stores were required; whether, in short, the master was unable to proceed with his ship to England without assistance; still less was there any inquiry whether he had any property, any credit, who were his agents, nor how he had been enabled to obtain supplies for the two months that the vessel had been at the Mauritius. This silence is the more extraordinary, because, by the terms of the advertisement, application was to be made to Thomson & Co., yet of them no inquiry is made.

If Hudson were a swindler, as Barlow describes him, Barlow must bear the loss consequent upon his own neglect and indiscretion in trusting him; he has no right to secure himself and throw the loss upon Hudson's co-owner, or upon the other creditors. Whether Mr. Barlow may or may not be entitled to prove a debt under the bankruptcy, is not for this court to decide; but, in my judgment, there was no necessity whatever for this advance on bottomry; there was no want of credit; no reasonable inquiry; and no due diligence; and the accounts show that all the necessary advances had been

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The Eliza. 3 Hagg.

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made by Thomson & Co.; and that they had on the day that this bond was given means arising from the cargo of rice to [ \* 86 ] \*enable this ship to go to sea; and it is not to be presumed that they would have detained her even if a small balance were due to them. It is, I repeat, essential that a lender on bottomry should ascertain that there is an unprovided necessity, and then he may not be bound to see to the application of money which he has fairly and legally advanced. If, under the circumstances of this case, a bond were to be supported, it would be highly injurious to the shipping interests and the general commerce of the country. The court therefore rejects this claim of Mr. Barlow, and directs the remaining proceeds to be paid out to the assignees.

For the assignees, costs were prayed. Mr. Barlow, it was said, had attached the money in Balmano's hands.

SIR J. NICHOLL. There is no appearance of fraud as regards Mr. Barlow in this transaction; he acted under advice. There was certainly a great want of caution on his part, but nothing more. It is an unfortunate case for Barlow, and also for the estate of the owners; but, under all the circumstances, I shall not give costs to the assignees.

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[ \* 87 ]

\* ELIZA, Weddell.

June 15, 1833.

Freight, earned from sub-shippers of goods by permission of the charterers of the whole ship, is liable, as against them, in payment of a bottomry bond given at the port of the charterers, for advances subsequently to the charter-party. Of two bottomry bonds, the latter has a priority.

BOTTOMRY bond. "I, J. Weddell, master of The Eliza, of 312 tons' burthen, now off Hobart Town, Van Diemen's Land," &c., "on the point of proceeding to sea with a cargo for London, and justly indebted to sundry persons in sums altogether about 560*l*., for provisions and other necessities for the crew of the said ship, and for supplies for her intended voyage, and being unable to pay the same, &c., W. Walkinshaw and G. Watson have, at my request, this day advanced the said sum, at 35*l*. per cent., on bottomry of the said ship and her freight (if any payable) together with her tackle, apparel, and

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The Eliza. 3 Hagg.

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appurtenances, &c., the same to be paid at or before the expiration of two days after the safe arrival of the ship at her moorings in the Thames, or, in case of her loss, such an average as by custom shall have become due on the salvage." The bond was dated 21st January, 1832. The ship had been chartered at Van Diemen's Land on the 25th of July preceding.

The ship and sub-freight (arising from goods shipped by permission of the charterers) were arrested at the suit of the agent for the bondholders; and on 3d November, 1832, the bond, *in pœnam*, was pronounced for, and the ship sold. The proceeds from the sale were 932*l.* 14*s.* 6*d.*, and the surplus freight was 576*l.* 13*s.* Out of these sums, the wages and pilotage having been paid, there was a deficiency for the discharge of the bond. The owners were insolvent. On the 12th of January last, an appearance was given for Messrs. Wilcox, \* of Hobart Town, the charterers; and, in opposition [ \* 88 ] to the bondholders, prayed the balance of this surplus or sub-freight in the registry to be paid to them.

*King's Advocate*, for the charterers. The whole ship was chartered to Kemp & Wilson, and they are entitled to this freight. The master had not a power to hypothecate it; he was not their agent, and the bond does not profess to bind them. There was no privity between them and the bondholders.

SIR J. NICHOLL. Suppose that the charterers had taken a bottomry bond on the ship and freight, and that, on her voyage home, the master, having put into the Cape for repairs, had there taken up money again on bottomry, would not the bond at the cape have the priority? I think this is the same case.

*King's Advocate*. In the instance put by the court there is no doubt; but I am not quite prepared to admit that, under all circumstances, where two bonds of different dates are given at the same port, the principle of priority would apply.

*Dodson*, for the bondholders, not heard.

The facts of this case are in a narrow compass. The vessel, while at Hobart Town, after a long voyage, wanted repairs and necessities; and expenses were thus incurred which the master had no means of paying. At Hobart Town the whole ship was chartered to Kemp & Wilson, for the voyage home, at 1,200*l.*, and this sum was paid to the master, who applied it to the ship's account; it



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The Hector. 3 Hagg.

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[ \* 89 ] \* was, however, insufficient to pay all the demands against the ship. This was represented by the master to the charterers, but they declined to advance money on bottomry or otherwise, and the master then took it up of other merchants in Van Diemen's Land. The charterers, it appears, allowed various persons to ship goods at certain sub-freights; and upon the arrest of the ship and freight, in discharge of this bottomry bond, the several consignees of those goods paid in their amount of freight.

On behalf of the charterers, it is said that the ship made no freight home; that all these sub-freights were earned for, and belonged to, the charterers, and not to the ship. The argument is specious; and were the question only with the ship-owners, it might be successful; but the question is with the bottomry bondholders; and they maintain that, but for the bond, no part of the freight, neither for the charterers nor sub-shippers, would have been earned. The master states in his affidavit that he would have been obliged to sell the ship to liquidate his debts and engagements on her account. Suppose that when the ship sailed, not only the freight, but the ship itself, had been hypothecated to the charterers; and in the course of her voyage the master had been compelled to resort to another bottomry bond, the latter bond, it is admitted, would have a priority. If I am not mistaken, the same doctrine has been held in respect of two bonds given at the same port.<sup>1</sup>

The bottomry lenders in this case were no parties to the [ \* 90 ] chartering; they might be altogether \* ignorant of the existence of the charter-party, and they took the security of the ship and freight in the ordinary mode upon an advance on bottomry. Considering, then, that the sum so advanced was necessary to enable the ship to bring home even the charterer's goods, and that freight was earned from the sub-shippers, I am of opinion that it is liable to the bondholders, and that the remaining proceeds belong to them, and not to the charterers.

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HECTOR, Freeman.

June 26, 1833.

A lugger, with a crew of five, engaged to go to Dover and bring out an anchor to a vessel in the Downs. After shipping a heavy sea in quitting the harbor, and plying about in a

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<sup>1</sup> See *The Betsey*, Hay, 1 Dod. 289.

## The Hector. 3 Hagg.

dark and squally night in February in search of the vessel, which had not kept to the agreed station, she put the anchor on board. For this service, upon a value of 16,500*l.*, a sum of 60*l.* was awarded by Commissioners of Cinque Ports. The owners refused payment, and tendered 31*l.* 10*s.* in a suit for salvage. 60*l.*, with costs, given. Salvage is not a payment merely for work and labor.

**SALVAGE.** Value of ship, cargo, and freight, 16,500*l.* The pilot stated, "that on the 17th of February, 1833, at 2 P. M., he went on board The Hector, off Dungeness; that it blew strong at S. by W., with rain and squalls, and the ship having but one bower anchor, it was not safe to proceed without procuring another . . . . that the master accordingly employed the lugger Catherine and her crew (five in number, and which had come alongside) to procure an anchor from Dover; that the appearer (the pilot) informed them that he should anchor in the small Downs, and hoist two lights on the yard arms as a signal; that the appearer then proceeded with the ship for the Downs, with the wind increasing, and the evening darker than he had ever experienced; that at eight he was off the South Foreland, and soon afterwards lost sight of the lights thereon; and not being able to see the land, he kept the lead going, and knowing that \*a large fleet of ships would be at anchor in the [\*91] Downs, and considering that it would be very unsafe to run through them into the small Downs, as at first intended, he brought up nearly opposite to Deal Castle, after which he hoisted the two lights as a signal for the lugger; that she did not come during the night, but at dawn he discovered her plying about in the small Downs, where he had directed; that she made the ship, and some of the crew came and assisted to rig the gear and hoist the anchor, which was accomplished about half-past nine." For this service the commissioners at Dover, appointed by the Lord Warden of the Cinque Ports, awarded, on the 24th of February, the sum of 60*l.* The owner did not appeal, but refused payment.<sup>1</sup> An act on petition was accord-

<sup>1</sup> On 20th March, 1833, *Phillimore* moved for a monition against the owner of the ship, to show cause why he should not pay the amount of the award; but Sir Christopher Robinson was of opinion that the court had no such power: "there was no appeal from the award. The salvors might originate a suit in the Court of Admiralty, and for that purpose take out a warrant of arrest." Thus the above suit commenced.

In *The Minerva*, Gibson, 19th December, 1833, the *King's Advocate*, on an affidavit that the owners had not paid salvage awarded by magistrates at Colchester, and that the ship was about to leave that port, applied for a warrant of arrest, as in an original cause. Sir John Nicholl decreed the warrant, observing that the want of power in the Court of Admiralty to enforce such an award seemed a defect in the act of Parliament. See 1 & 2 Geo. 4, c. 75 and 76. [The defect is cured by act of 3 & 4 Vict. c. 65.]

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ingly entered into; and upon the same being delivered by the salvors, the owner tendered 31*l.* 10*s.* This tender was refused.

*Phillimore* for the salvors. The action is unavoidable; [ \* 92 ] no other remedy. Nothing to \* warrant a resistance to this award. If the owner had been dissatisfied, he should have appealed.

*Addams, contra.* Had the owner appealed, he would have admitted there was an award. The commissioners' order was made *ex parte*, and is not binding upon the owner; the master and mate swear that the engagement was to put the anchor on board by eight that evening; this contract was not fulfilled.

*Sir John Nicholl.* By the tender the owner admits some service. If the lugger did not do what she ought, why is there any offer?

*Addams.* The anchor was put on board next day; so far there was a slight service; the tender is ample; there were only five men. The value of ship and cargo is not important.

*Sir John Nicholl.* This is a suit brought to recover a sum by way of salvage. The case has already been before commissioners of the Cinque ports, and they have awarded 60*l.* The owner refused to pay that sum, and the present suit was instituted. Here the owners have made a tender of 31*l.* 10*s.*, and the question is, whether the award or the tender be most proper. The presumption is in favor of the award; but it is said it was made *ex parte*. If that were so, it was the owners' own fault; there were six days between the performance of the services and the award; and Mr. Latham and Mr. Curling, agents for Lloyds, and the owner of the ship, Mr. Goad, were all acquainted with the business. It might, therefore, be a ques- [ \* 93 ] tion, \* whether such an award—not being appealed from—is not binding upon the owner. The letters are important to show that there was no delay in the communications between the agents for Lloyds and the owner. Mr. Latham, on the 18th of February, in writing to the owner, says, "We desired Captain Freeman to inform us whether he had or would agree with the boatmen for carrying off the anchor, or whether he wished their services referred to the salvage commissioners; we have no reply from him, and you may probably give us your instructions;" and by return of post the owner refers him to Mr. Curling for instructions. In regard to the merits, the salvors are charged with misrepresentation, and to make

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that out, the affidavits of the master and second mate are relied upon. The salvors have on their side the affidavit of a gentleman who was a passenger on board, and also of the harbor-master at Dover. In salvage cases there are usually some conflicting statements; and in the salvors some exaggeration possibly; but as far as I can collect, the truth is here with the salvors, and that upon the owners' own showing.

The facts are these. This ship was on her voyage from Ceylon to London with a valuable cargo. It was said by the counsel for the owners that the value was a circumstance of no importance; but that is not so; the value is uniformly an ingredient, the remuneration being always larger when the property that receives assistance is large than when it is small; and the reason of the thing and the feeling of every individual cannot fail to go with that which

has ever \* been one of the ruling principles in salvage cases. [ \* 94 ]

The weather was squally; the ship had only one anchor; the pilot informed the captain that another was necessary; the words of his affidavit are, "that it was essential for the safety of the ship;" this lugger, *The Catherine*, was alongside; she took off two passengers, and a letter was despatched by her to Latham & Co. for an anchor of eighteen hundred weight to be sent off immediately from Dover. It has been said that there was an agreement with the boatmen that the anchor should be on board by eight that evening, but I see nothing to that effect; if there were such an agreement, and the service were not performed, there should be no pay. I think, however, it is hardly possible that such an agreement should have been made.

The lugger, having received on board the anchor, put to sea between ten and eleven at night. Latham's letter to the owner states, "it blew hard from the southwest, and the boat shipped a heavy sea on leaving the harbor." This confirms the affidavits of the boatmen and the harbor-master and mate of *The Hector*, who say, "that the weather was fine and moderate till the whole service was performed, except a heavy squall of two hours about midnight;" — the lugger was out in it. She was beating about in search of this ship all night — so dark that the lights at Deal were not visible — but she rode out the storm, and in the morning made the ship in a different place of anchorage from that appointed — a fact spoken to by the pilot — and succeeded in putting this \* heavy anchor on [ \* 95 ] board. Whether the lugger then received some injury is in dispute between the parties; the owners on this point prove that the lugger had been damaged on the day before off Dungeness; and that being so, there was a greater risk to the men in the performance of this service.

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I am then of opinion that the service was willingly, faithfully, and properly performed, and that there are no sufficient grounds to set aside this award made after due notice. Salvage is not a payment merely for work and labor; other considerations are to be adverted to — the general interests of navigation and the commerce of the country — to encourage exertion, and to excite to risk and peril in the relief of property in danger. It is true, on the other hand, that the court must guard against exorbitant demands, and an undue advantage being taken of distress; but when salvors act honestly and fairly, they are to be liberally rewarded, without a minute inquiry into the quantum of labor. Considering the large value of the ship and cargo, the roughness of the night, the service performed, and the view taken of it by commissioners on the spot, I am of opinion that the resistance to the award is improper, and not extremely creditable. I shall pronounce for the payment of 60*l.*, and with costs. If the award had been of long standing, I should have decreed interest.

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[ \* 96 ]

\* THE KING v. BENSON.

June 26, 1833.

A master of a British merchant vessel condemned in the penalty of 50*l.*, and in costs, for wearing illegal colors.

On the 14th of February, a warrant of arrest was decreed against William Benson, late master of the merchant steam vessel, *The Lord of the Isles*, for a contempt in wearing illegal colors. The master gave bail. Articles were exhibited alleging, among other things, that on the 7th of December, 1832, the said William Benson, in or near the river Douro, on the coast of Portugal, did wear, carry or hoist a red pendant at the main peak of the said merchant steam vessel, and that Captain Belcher of H. M. vessel, *Ætna*, came on board and seized the same. The articles having been admitted, and an affirmative issue given, the court was moved to pronounce W. Benson to have incurred the penalty of 50*l.* imposed by the statute,<sup>1</sup> and to

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<sup>1</sup> 6 Geo. IV. c. 108, § 15, now repealed; but the 4 Will. IV. c. 13, § 11, enacts, "That from and after the passing of this Act it shall not be lawful for any of his Majesty's subjects whomsoever to hoist, carry, or wear, in or on board any ship, vessel, or fishing boat, or any other vessel or boat whatever, whether merchant or otherwise,

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\*condemn him in the said sum to be paid to his Majesty [- \* 97] in his office of Admiralty, and in costs.

The *King's Advocate*, and the *Advocate for the Admiralty*, in support of the application.

SIR JOHN NICHOLL. The defendant has been articted against for wearing colors worn by H. M. ships. The inconvenience of such conduct is obvious; the penalty for the offence is inflicted by act of parliament; and, by the words of the act, the court has no power of mitigating the penalty; indeed, perhaps, under the circumstances of this case, It has \*no wish to mitigate [ \* 98] it, because at this particular time a vessel, going into the Douro under colors usually worn by H. M. ships, might throw doubts on the neutrality of this country and involve her national honor. I

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belonging to any of his Majesty's subjects, his Majesty's jack commonly called the union jack, or any pendant or any such colors as are usually worn by his Majesty's ships, or any flag, jack, pendant, or colors whatever made in imitation of or resembling those of his Majesty, or any kind of pendant whatsoever, or any ensign or colors whatever other than those prescribed by the said proclamation; and that if any person or persons shall nevertheless presume to hoist, carry, or wear in or on board any ship or vessel, fishing boat, or other vessel or boat whatever, belonging to any of his Majesty's subjects, whether the same be merchant or otherwise, his Majesty's jack commonly called the union jack, or any pendant or colors such as are commonly worn by his Majesty's ships, or any jack, flag, pendant, or colors whatever made in imitation of or resembling those of his Majesty, or any kind of pendant whatever, without such warrant as aforesaid, or any other ensign or colors than the ensign or colors prescribed by the said proclamation \* to be worn, then and in every such case the master or other person having charge of such ship, vessel, or boat, or the owner or owners thereof being on board the same, and every other person so offending, shall for every such offence forfeit and pay a sum not exceeding five hundred pounds, to be recovered, with costs of suit, either in the High Court of Admiralty of England, or in any Vice-Admiralty Court in his Majesty's colonies, or in any of his Majesty's Courts of King's Bench or Exchequer at Westminster or Dublin, at the suit of his Majesty's Attorney-General, or in the Courts of Session or Exchequer in Scotland respectively; and that it shall be lawful for any officer of his Majesty's navy or marines belonging to any of his Majesty's ships, or any officer of the customs or excise, to enter on board any ship vessel, or boat so hoisting, wearing or carrying any jack, flag, ensign, pendant or colors prohibited by the said proclamation and by this act to be hoisted, worn or carried, and to seize and take away the same, and the same shall thereupon become forfeited."

On the 4th of November, 1829, a warrant of arrest † issued against the master of the merchant schooner, *Native*, for contempt, in passing H. M. S. *Semiramis* in Cork harbor, without striking or lowering her royal, being the uppermost sail she was then carrying.

\* See proclamation, 1st January, 1801.

† Warrant of arrest for not striking topsail.

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condemn the defendant in the penalty of 50*l.*, and in costs. The monition will direct him to pay the penalty to the king in his office of admiralty.<sup>1</sup>

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H. M. S. THETIS.

November 5, 1833.

*Sembla.* An inhibition, in an appeal by some salvors, does not necessarily preclude other distinct salvors, who do not appeal, from receiving their proportionate remuneration.

THIS was an application on the part of the Hon. Capt. De Roos, the officers and crew of *The Algerine*, and those acting under him, to receive out of the registry their proportion of the salvage remuneration, due upon the specie which they had saved; and that the proportion might be calculated according to the valuations in the affidavits of Capt. Dickinson, and of the agent for *The Algerine*.

*Curteis*, for the motion, read the decree;<sup>2</sup> and stated that there was no appeal by, nor any inhibition served upon, his parties, and that their share was clear and defined. The owners acquiesce.

*Addams, contra.* The court is inhibited; it cannot interfere. The decree so mixes up the entire salvage that it cannot be separated. The property recovered consists of a variety of different metals, and there is no accurate valuation of them; on this ground alone I oppose the motion.

SIR J. NICHOLL. After stating that the services of *The* [ \* 99 ] *Algerine* and \* *Lightning* were not performed together, and that the property saved and the actions were distinct, proceeded, — From the decree in this case, there are two appeals, one, on behalf of Admiral Sir Thomas Baker; the other, on behalf of Captain Dickinson and *The Lightning*. The remaining parties in the principal suit, namely, the owners, *The Algerine* and others, have acquiesced in the decree. The only ground of appeal is, I understand, that a larger sum than 17,000*l.* has not been given for distribution as sal-

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<sup>1</sup> See *The Minerva*, 3 Rob. 34, and note, *ibid.*

<sup>2</sup> See p. 65.

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vage; but there is no appeal as to the mode of distribution among the salvors. The single question, therefore, for the Superior Court will be, whether 17,000*l.* is a sufficient remuneration. In both appeals inhibitions have been served upon this court, and they enjoin that nothing shall be done to the prejudice of the appellants; it is, then, for my consideration, whether the present motion can be granted without prejudicing their interests. The application is, not to pay out the whole salvage, but only the portion due to Captain De Roos and the crew of The Algerine ratably; and there is no difficulty in ascertaining that portion, it being a fourth of 14,000*l.*, the clear sum that will remain to be divided between The Lightning and Algerine, after deducting the admiral's share. After this partial distribution, both the admiral and Captain Dickinson will have abundant security in the fund that will still remain within the jurisdiction of the court; and I do not see any objection why each party may not receive what is admitted to be due, only reserving of the fund sufficient to answer any further demand against the owners, and whatever further expenses may be incurred. Unless, therefore, some \* prejudice to the appellants can be shown, [ \* 100 ] I am inclined to grant this motion. It is always desirable that rewards for public services should be speedily paid; they may then be expected to reach those who earned them, and the encouragement is so much the greater. The court, however, cannot interfere to the prejudice of any party; if, therefore, any party be not satisfied with the valuation of the property, he is entitled to a decree of appraisalment; but that will lead to expense.

On the 7th of December the matter was mentioned again; but the difficulty as to the valuation was not removed; and ultimately The Algerine's proportion was, as the editor is informed, paid by the underwriters.

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THE HOGHTON, Brady.

November 5, 1833.

The ship's articles contained a printed clause (usual in the Baltic trade) to this effect: "And should the ship or vessel winter abroad on account of the ice, the officers and seamen agree to accept half the wages agreed upon during the time of such detention." The ship went out "seeking;" the ice prevented her from getting a cargo, but not from sailing without one; she wintered abroad: held, that under the circumstances, the crew were only entitled to half wages during her detention.

THIS was a suit for a balance of wages, at 4*l.* 10*s.* per month,



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brought by James Davies, late mate of The Hoghton, from the 24th of September, 1831, to the 8th of June, 1832. In the ship's articles, the voyage was stated to be from the port of Hull to Riga and back to any port in England, Scotland, and Ireland: they further contained this (printed) clause: "and should the said ship or vessel winter abroad on account of the ice, the said officers and seamen agree to accept half the wages agreed upon during the time of such detention."

The summary petition alleged, "that the ship did not winter abroad on account of the ice, for that during the time [ \*101 ] she lay at Riga and at Bolderaa, \*many vessels entered and left the said ports, and the ice did not prevent The Hoghton nor any of the vessels in the said ports from shipping a cargo and going to sea at any time during the winter."

'The allegation for the owners pleaded, in substance:<sup>1</sup> 1st, "that The Hoghton sailed for Riga, not freighted by any person or firm, but as a general ship;" that she "went out seeking;" no engagement whatever having been made for her homeward voyage, all which was well known to the officers and sailors before she sailed; that she arrived at Riga on 29th October; discharged her goods and ballast; on 10th November, took in such part of a cargo as then offered; but that from the severity of the weather no further cargo could be obtained, notwithstanding the greatest exertions; that on 23d of November, the river being then full of ice, the ship was removed to Bolderaa, (about eight miles from Riga,) from whence she might, in the event of her getting a cargo transported over the ice, get to sea; that at Bolderaa she was safely moored, and compelled to remain there from the 1st of December till the 6th of April, when the ice broke up; and she proceeded to Riga, and from thence, on the 27th of May, took a cargo for Hull, where she arrived on the 8th of June, 1832."

2d. "That about twenty-five vessels went down with The [ \*102 ] Hoghton, to Bolderaa on the 23d of \*November, some of which afterwards proceeded on their respective voyages; but they had previously engaged cargoes, and were either fully laden before they quitted Riga, or partly laden, and the remainder of the cargoes towed down in river craft to Bolderaa; that The Hoghton was frozen up and fast in the ice at Bolderaa, from December to April, and was compelled to winter abroad on account of the ice,

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<sup>1</sup> The admissibility of the allegation was opposed, first, *in toto*, upon the authority of The Juliana, 2 Dod. 504, and 2dly, as to some of its details. Sir Christopher Robinson directed the allegation to be reformed.

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and that according to the usual and invariable custom amongst owners, captains, officers, and sailors, engaged in the Baltic trade, in similar circumstances, which entail great expense upon the owners, the officers and seamen of The Hoghton are only entitled under the mariner's contract to one half of their respective wages therein specified, for such time as she was so frozen up; and that the crews of several vessels that wintered at Bolderaa with The Hoghton, on account of the ice, were only so paid."

Six witnesses on either side. Portions of the evidence are as follows:

For Davies—four mariners of The Hoghton, a seaman of The Watson, and the second mate of The Eagle, both of Hull, deposed to the effect, that The Hoghton was not detained at Bolderaa or Riga on account of the ice; that there were but seventeen days in the whole winter when the ice was so as to prevent her from getting out to sea; that whilst she was at Riga and Bolderaa many vessels that arrived after The Hoghton got cargoes and went to sea; and among them two brigs, The Express and Rhine, both of Hull. The Hoghton and Watson were about 270 tons; The Eagle about 300; the latter dropped down to Bolderaa about

\* a week before The Hoghton, and sailed on 12th of Dec- [\*103] cember.

For the owners—Brady, the late master, deposed: 1st, I have been master of different vessels for about forty years. The Hoghton belongs to Terry & Son, merchants, of Hull; the crew of The Hoghton consisted of eleven persons besides myself; the officers and crew knew what we were going for; they all signed the ship's articles, and some of them had been in The Hoghton on a similar voyage before. On the 10th and 19th of November, we took in some lath wood to stow in the hold. It cost, I believe, about 70*l.* to cut through the ice. We lay at Bolderaa for safety. While there, I kept up a constant communication with Messrs. Cumming, the consignees, for a cargo; but nothing could be procured till we returned to Riga in April.

2d. After The Hoghton and the other vessels had come out of the ice from Riga to winter at Bolderaa, no vessel entered to go up to Bolderaa till the frost broke up at the end of March. We were compelled to winter abroad on account of the ice, unless we had come away without a cargo. I consider that the owners sustained a loss of from 200*l.* to 300*l.* by our wintering abroad. I have frequently been

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out on similar voyages, both as mate and master, and I always signed articles to accept half wages in case of detention by the frost.

Upon the interrogatories. 3d. Owners sometimes, who ship their own goods, limit their agents in the price. I have no reason to think that the owners of The Hoghton did. 7th. I had an offer [ \*104 ] \*in March of a cargo of rye for Antwerp; but I could not take it because of my articles. 8th. From Bolderaa many vessels sailed in November. I only recollect one English ship sailing from thence in December, to Hull. 14th. The Rhine and Express were consigned to different merchants to ours, and were much smaller vessels. They both got cargoes and went away, one to London and the other to Hull.

W. Wise, on the 1st. I have commanded vessels belonging to Hull engaged in the Baltic trade for thirty years. On the 2d. In case of vessels being detained, as my ships have been many times in the Baltic ports, by the ice, and obliged to winter there, the crews are always put on half pay. There is a printed clause inserted in the ship's articles agreeing to this; and the half pay is reckoned from the day the vessel goes into winter harbor till the ship arrives in the spring. The crews had always half pay on such occasions, and no more. Upon the special interrogatory: Where ships in the Baltic trade are kept during the winter in the Baltic under similar circumstances with The Hoghton, which I understand to be the ice setting in before she could get a cargo, the officers and men are by the mariner's contract, and also according to the invariable custom, entitled to only half wages. The captain's wages are not altered. If the captain could get a freight and come away, and did not, I should consider it not just to the men to give them only half wages.

Taylor, also a master mariner, spoke to the introduction of the clause in the ship's articles, and to the custom.

[ \*105 ] \*Peter Kœnig, master of the brig Cossack of Riga. 1st. I am a German by birth. I recollect Captain Brady at Riga town about the beginning of November; he was waiting for a cargo; I was too; but there was no cargo to be got; we were obliged to wait at Bolderaa all the winter.

2d. I consider that The Hoghton was compelled to winter abroad on account of the ice. By the rules and custom of my country, after a ship has waited four weeks for a cargo, and is obliged to winter in a foreign port, the crew have only half pay from the end of the four weeks. It is so at Bremen; and I have known German crews

detained by the ice receive only half pay. It is put into the ship's articles, but the rules of some countries give it without, Lubeck, for instance ; so that without any thing being said on that point in the articles, they would have only half pay if detained by the winter. Upon the special interrogatory: All our Lubeck ships and all the ships in the Baltic, when detained in any port by the winter, invariably pay their officer and crews only half wages during their detention. I consider that if The Hoghton had been offered a freight in the winter, and declined it in hope of a better in the spring, that still the men would, according to custom, be entitled only to half pay, because the captain's duty is to do the best for the ship, and a low freight in the winter would be not worth his going for ; and the men must take their chance.

Samuel Frost, commander and part owner of The Watson, of Hull. 1st. The Hoghton was at Riga when we arrived ; we both of us went out "seeking," as it is termed. I daily applied to Cumming & Co., for a cargo, and attended \* change, and very [ \* 106 ] frequently saw Hardy at both places inquiring, like myself ; and from Bolderaa we five or six times went up to Riga to apply for a cargo ; in March, a cargo for Antwerp was brought to me in sledges ; my ship was cut out of the ice. 2d. It is the invariable custom for crews engaged in the Baltic trade, when detained, as The Hoghton was, for the winter, to receive half wages only. I have twice wintered at Cronstadt and Petersburg, and on both occasions paid my ship's crews half wages only, during the time of detention, and while I was at Riga on the occasion deposed of, although at first my crew objected to the half pay, because instead of going back to England I went to a foreign port, yet the men afterwards consented, and received half pay for three months. The Scotch captains paid their crews the same, at least Captain Adamson so paid his crew in my presence at Antwerp, and Duff has told me he had done the same. This agreement is printed as part of the ship's articles. The expenses of my detention were about 230*l.* only, for house rent on shore and provisions. Upon interrogatory. 8th. The Eagle and Adelaide sailed in December ; the latter two or three days after the former. 9th. I believe Brady would have taken any cargo for an English port. 10th. Vessels of the burden of 200 tons and upwards ordinarily drop to Bolderaa to complete their cargoes. 14th. Some vessels did arrive at Riga after The Hoghton ; The Express was one. The vessels that got away, I believe, were chartered vessels, and small vessels that would be content with seventy or eighty tons of cargo. 15th. I would have come away if I could have got a cargo for any port in England. It is not usual

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[ \* 107 ] for vessels trading to the \* Baltic to winter abroad, unless good freights can be obtained. I never wintered abroad for want of a good freight, it was because I could not get any at all.

Mr. Hadden, a merchant of Riga, deposed to the exertions of Brady to obtain a cargo, but without success till the spring; that vessels above 150 tons commonly after taking in part of their cargo at Riga town, drop down to Bolderaa, there to complete lading.

Annexed to Brady's deposition were two letters from the owners. The first was dated Hull, 22d September, and contained the following passages: "At Riga you will consult with Cumming, Fenton, & Co., what is best to be done with your ship. We have made no engagement whatever for your homeward voyage, we should, however, prefer your coming to Hull if you can readily get a cargo; but if the freights are much better to London, we have no great objection to your going there. Your insurance is effected out only." The second letter was dated 18th January, and began thus: "We are sorry to find that you have been obliged to winter at Riga, but it cannot now be helped. We shall be glad to hear once a fortnight, or three weeks, what prospect you have of goods, and how all are on board."

*Dodson* and *Addams* for the mate. The detention was not on account of the ice, but from want of a cargo; the vessel might at any time have got away from Bolderaa. Contracts should be construed favorably for the mariner; special covenants in them are strongly discountenanced; where they exist there must be proof that [ \* 108 ] they were specifically pointed out. The master, who has his full pay, is the only evidence that the particular clause in the articles affecting the seamen's wages was known to them. In *The Juliana*,<sup>1</sup> wrecked upon the Goodwin Sands on her homeward voyage, Lord Stowell, in construing a clause restrictive of a right to wages until the ship arrived and the cargo was delivered at the last port of discharge, held that such a clause was no bar; that the seaman was entitled to a favorable construction of his contract, and that if a plank of the ship were saved, he should have his wages.<sup>2</sup>

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<sup>1</sup> 2 Dod. 504.

<sup>2</sup> See *The Neptune*, Clark, 1 Hagg. 227; *Jesse v. Roy*, 4 Tyrwhitt, 626; and *Brown v. Lull*, 2 Sumner, (U. S.) 444.

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Unless The Hoghton was positively and strictly detained by the ice, the mariner's claim should not be defeated.

PER CURIAM.

The *Juliana* was a case, I think, of a divided voyage, and of freights earned at different ports. Here the question is, whether the master was not justified in waiting for a cargo; the usage in the Baltic trade as to half wages is proved. Do not the terms of the contract show that the voyage was a "seeking" voyage?

The *King's Advocate* and *Daubeny*, for the owners. The general understanding of the Baltic trade as to half wages on a detention by the ice, admits of no doubt; the circumstances of this case bring it fairly within such a detention. If in a mariner's contract, any very special covenant affecting the men is inserted, we admit it should be proved to be within their knowledge; but \*can [\*109] this clause, upon which the whole case turns, be so considered, in reference to the particular trade, and the nature of the voyage? The master's evidence, even if the clause be regarded as special, sufficiently proves knowledge, and the contrary is not even averred by the mate in his summary petition. The case of *The Juliana* does not apply; the claim there was by a common seaman, and the court has otherwise already disposed of it.

SIR J. NICHOLL. This is a suit for the recovery of mariner's wages, instituted by Davies, late mate of *The Hoghton*; the voyage on which the wages are claimed, was "from the port of Hull to Riga and back to any port in England, Scotland, or Ireland;" the monthly wages agreed upon were 4*l.* 10*s.* The vessel sailed about the 25th of September, 1831; she arrived, after a long passage, at Riga, at the end of October, and returned to Hull in June, 1832. The whole wages are stated by the mate to be 38*l.* 5*s.*, but he gives credit for 23*l.* 7*s.* 8*d.*, and therefore sues for 14*l.* 7*s.* 4*d.*, a small sum, but involving a principle of some importance. The suit is for the balance of the whole wages; but the owners contend that half only are due.

The mariner's contract describes the voyage and the nature of the agreement; it contains also a clause to this effect: "should the vessel winter abroad on account of the ice, the officers and men agree to accept half wages during the time of detention." The question here is, whether, according to the true interpretation of this clause, the vessel did winter abroad "on account of the ice," and upon the result of the evidence there can be little \*or no [\*110] doubt on its true construction and effect. The summary

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petition denies that the vessel did winter abroad on account of the ice; and it has been contended that the detention was from want of a cargo. What are the material facts? The vessel, it appears, sailed from Hull very nearly in ballast; she had only about twenty tons of cargo, quite insignificant in a vessel of 270 tons; it would at once, therefore, be obvious that she went out for the purpose of procuring a return cargo; she was not chartered by any one, but she sailed in search of a freight, or, as it is technically termed by one of the witnesses, she went out "seeking;" and the fact that she so went out could scarcely have been otherwise than known by the mariners. The contract shows that the vessel was to return generally to some port in the United Kingdom; and the letter of instructions to the master is in conformity with the contract. If that letter had disclosed any thing of deception towards the men I should have viewed the case very differently; but it imposes no limitation as to the return voyage which can fairly be said to be kept out of the contract. It was late in the year when The Hoghton sailed; every exertion, it seems, was made at Riga to get a freight, but without success; and it can hardly be supposed that the owners and master would have suffered the vessel, at great loss of time and at great expense, to remain all the winter at Riga, but for the impossibility of getting a cargo; indeed, a letter from the owners annexed to the master's deposition expresses their regret at her detention. Was then the want of

a cargo a reasonable cause of detention? The frost set in [ \* 111 ] about the 20th of November; the river was frozen over, \* and

all vessels at Riga were ordered by the harbor master to go down to Bolderaa, about eight miles below Riga; and for this obvious reason, because by the regulations no vessel at Riga is allowed to have a fire on board, and the crews generally are not sufficiently seasoned to live on board in the winter without. A passage was cut at considerable expense through the ice for The Hoghton and several other vessels, and on their reaching Bolderaa, which is described as something like Gravesend in respect to the port of London, they were safely moored. The Hoghton was frozen up at Bolderaa for four months, and the question was, whether the mariner, under a fair construction of his contract, should receive the whole or only half wages for those months. One fact was clear, that though the mariners belonged to the vessel during that time they did no duty; they could render no service; they acted however with propriety, and the mate comes forward with a good character, and is therefore entitled to a favorable view; but I must remember that the owners, who are ready to pay half wages, have been already put to considerable expenses; they were under the necessity for four months of providing

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lodgings on shore for the mariners, and a Russian ship-keeper to watch the vessel during the night.

It was truly stated, that several of the vessels, that went down to Bolderaa with The Hoghton, put to sea, but under different circumstances from The Hoghton; some had full cargoes, others had their cargoes completed by means of small craft, several went to foreign ports, and were smaller than The Hoghton; so that the cases of those vessels prove nothing as against this vessel. But two

\* English vessels — The Hoghton being one, and The Wat- [\* 112] son — and two Scotch, remained till the frost broke up in April. The Watson got away first, but she took a freight to Antwerp, while The Hoghton was bound to return to some port of Great Britain or Ireland. So soon, however, as the frost broke up, The Hoghton returned to Riga, and at length sailed with a cargo and arrived at Hull. Such are the material facts.

Now if the court could discover any contrivance between the owners and the master about the freight, if even any negligence in procuring a freight, the case might be altered, and might furnish some ground for pronouncing for the whole wages; but there was every exertion to get a cargo. If then the mariner's construction of his contract be upheld, I hardly know of any detention by ice that can bring a vessel within the terms "wintering abroad on account of the ice;" nor do I see any reason to think that this is a hard contract on the part of the ship-owners against the men; it is true that were there a doubt upon the construction of it, the court would look favorably to the claims of the mariners; but there is no doubt; it is the usage of the trade between this country and the Baltic ports; it also is proved to be the general usage of other countries, and to constitute a part of the general maritime law. It is also proved that generally such a stipulation forms part of the mariner's contract upon Baltic voyages; this must have been well known at the port of Hull, and I see no reason to think that Davies signed the contract without knowing its effect. The court is anxious to protect mariners against any circumvention and even misapprehension and error, but I

\* find no ground for either; and it is equally the duty of the [\* 113] court to protect the fair interests of ship-owners and merchants; all loss and inconvenience are not to fall upon them; the mariners must, as I have said, take the risk of waiting in such voyages. The vessel went out almost in ballast; the object of the voyage was a return freight; obviously, therefore, she went out to seek, not to fetch, a cargo already engaged. Was she then immediately, when winter began, to return in ballast and make no freight? That could not be the understanding of the contracting parties; it



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The Triune. 3 Hagg.

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would have entirely defeated the whole object of the voyage. The master had a reasonable cause for waiting, and while so doing, the frost set in. I have no hesitation in holding that the circumstances of the case bring it fairly within the true construction and meaning of the contract. All due diligence was used to procure a freight; but not procuring a freight, the ice prevented the earlier return of the vessel; it occasioned her to winter abroad.

With all proper attention, therefore, to the just claims of this meritorious class of men, I am compelled to pronounce against the wages sued for; but I give no costs; there is no imputation on the owners of *mala fides*; and the case involves a principle of some importance. I am not aware of any judicial decision upon such a contract, and the mariner was fairly entitled to have a decision upon it.

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[ \* 114 ]

\* TRIUNE, Wardell.

January 14, 1834.

In a cause of collision, a warrant of arrest against defendant—a master, who was also owner, refused on an *ex parte* application and affidavit of the insufficiency of ship and freight to cover the alleged damage; but on proof of damage, and insufficiency of proceeds from the sale of the ship, and from the freight, to pay surplus, a monition decreed against defendant.

Defendant assigned to bring into the registry the whole freight, subject to a reference in respect of deductions for wages, &c.

DAMAGE by collision of two colliers, off the coast of Durham, on the 13th of February, 1833. The libel charged, that the “loss of The Triton was occasioned solely by the negligence and mismanagement or want of skill of R. Wardell, the master and principal owner of The Triune, and of others on board, and the want of a proper look-out.” On the 1st of March an action, in 2,000*l.*, was entered on behalf of the sole owner, and of the master and crew, of The Triton, against The Triune and her freight. An appearance was given for Wardell, the master and principal owner of The Triune. Witnesses were examined on both sides, and 58*l.* 3*s.* 4*d.* paid into the registry as the net freight. On the 26th of June, the court was moved on an affidavit of the owner of The Triton (stating the damage at 1,873*l.* 10*s.*; the valuation of The Triune at 1,164*l.* 7*s.*; and the gross freight at 119*l.*) to direct a sum of 60*l.* 16*s.* 8*d.*, (being the amount of deductions from the freight, for wages, shipping, and delivery expenses at Newcastle and London, and other charges,) as the balance of The Triune’s

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The Triune. 3 Hagg.

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freight, for cargo on board at the time of the damage, to be brought into the registry. The court was further moved for a warrant of arrest against Wardell, who was on board and in the charge and command of The Triune at the time of the collision. No bail had been given.

*The King's Advocate*, for the warrant of arrest. The 53 Geo. III. c. 159, which limits the \* responsibility of ship- [\* 115 ] owners in certain cases, does not affect this case. Sec. 1, enacts, "that no person or persons who is, are, or shall be owner or owners, or part owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which may happen to any goods, &c., or to any other ship or vessel, &c., further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage." The object of the statute was to protect absent owners; here the principal owner was also master and in charge of the vessel. Sec. 4, enacts, "that nothing shall lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner," &c. These two clauses were fully considered in *Wilson v. Dickson*,<sup>1</sup> in which, "in an action against several defendants, as ship-owners, for damage, it was held, that by the 53 Geo. III. c. 159, s. 1, they were not liable in that character beyond the value of the ship, and freight due or to grow due, although the loss was occasioned by the misconduct of one of the defendants, who was both master and part owner." Such is the language of the marginal note; but Bayley, J., observed: "it seems that the true construction of the clause (s. 1) is this, that if you sue a sole owner, and the fault or privity were in \* him, he [\* 116 ] will be excluded from the protection of the statute;" and again, after citing the fourth section, "it seems to me that the meaning of that clause is, that if the master be a part owner, his responsibility, if you sue him in his character of master and not as one of several part owners, will not be affected by the first section of the act." Abbott, J., and Holroyd, J., concurred.

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<sup>1</sup> 2 Barn. and Ald. 2.

SIR J. NICHOLL. Is there an instance of a warrant of arrest, under circumstances such as are in this case, against the master and part owner? However, the application is certainly premature. The court is in possession of the ship, and some freight has been brought into the registry; and the only proof at present of the insufficiency of this property is *ex parte*. When the owner of The Triton has proved his case, and showed an insufficiency of property, then may be the time to apply for a monition against the master and part owner of The Triune to make good the deficiency; but I reject this application.

In regard to the freight, I think that the whole freight should, in the first instance, be brought into the registry, and I accordingly assign the defendant's proctor to bring it in, reserving any question of deductions to be referred to the registrar and merchants.

At the hearing on this day, (14th January,) Sir John Nicholl, assisted by Captain Chapman and Captain Brown, two of the elder brethren of the Trinity House, pronounced, after argument by the *King's Advocate* and *Addams*, for The Triton, and *Dodson* [\* 117] and *Nicholl*, *contra*, "that the owner \* of The Triune, (namely, Wardell, who intervened in the suit,) was liable for the damage sustained by the owner of The Triton and her cargo, and also for the loss by the master and crew; and condemned Wardell and The Triune and her freight in the damage and in costs."<sup>1</sup>

The registrar and merchants having reported that 1,074*l.* 4*s.* 2*d.* was due to the owner, master, and crew of The Triton, in the several proportions set forth in their report, exclusive of interest until the same be paid, and of the proctor's bill, which had not yet been taxed, the proctor on behalf of The Triton applied for a monition against Wardell; but the court refused it, as the ship had not been sold, and it could not be stated for what precise amount the monition should issue; but, on a subsequent application, it being shown that the proceeds left a deficiency of 400*l.*, a monition was decreed against Wardell to pay that sum, which failing to do, he was imprisoned upon an attachment.

<sup>1</sup> [See The Mellona, 3 W. Rob. 21.]

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The Clifton. 3 Hagg.

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## CLIFTON, Lightbody.

January 22, 1834.

In an action entered in November, for salvage rendered in April, by a lieutenant of a coast-guard station, and four of his boatmen, a tender of 50*l.* pronounced for; and the salvors (who were resident out of the jurisdiction of the court) being condemned in 50*l. nom. exp.*, the sum paid into the registry by the owners, as the tender, was directed to be paid out to them in discharge of costs.

THIS was a cause of salvage promoted by Lieutenant R. N. Kelley, commander of the coast-guard station at Cairn Ryan, Stranraer, N. B., and four boatmen of that station, for services to The Clifton and her cargo, in April, 1832.

A private arrangement having failed, an action was, in November, entered in 800*l.*; the admitted value of the ship and freight was 6,800*l.* On the 25th of January, 1833, an appearance was given for the principal owners of the ship, denying the other parties to be salvors, and 50*l.* was \*brought into the registry as a [\* 118] tender, with such costs as were due by law, for the services. This tender was refused.

*King's Advocate* and *Nicholl*, for salvors.

*Addams* and *Haggard*, for owners.

SIR J. NICHOLL. I will not trouble the counsel for the owners. Before I proceed to the merits of this case, I must take some notice of the proceedings. The action was not entered until eight months after the service. This is contrary to the principle and object of the jurisdiction of this court, which is summary, expeditious, and of little expense, peculiarly in salvage cases. Here, on the contrary, have been delay and expense. On the 14th of February the salvors' act was delivered; the master and crew of The Clifton — upon whom alone her owners had to rely — were at sea or abroad, and so the act remained unanswered, when, in June, the court ordered the cause to come on *ex parte*, unless proceeded with. Since that order, there has been no want of activity or of detail; the act has been written to no less than six times, and at great length, not only going into the merits, but into much irrelevant and collateral matter; and in support of the act, there are altogether no less than thirty-five affidavits. It is most desirable to see whether some rule cannot be adopted to limit the proceedings; otherwise the jurisdiction may become useless. Costs alone are not sufficient to secure expediton, nor fully to indemnify the successful party.

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The Clifton. 3 Hagg.

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The question in the cause is, whether the tender of 50*l.* is [ \* 119 ] a sufficient compensation for the services \* of Lieutenant

Kelly and his four men, or whether there should be a greater reward, and, if so, to what amount? About the real substantial facts there can be no doubt; and they are in a very narrow compass. The Clifton, on her voyage from the Mauritius to Greenock, with a cargo of sugar, arrived on the 19th of April, about the middle of the day, off Loch Ryan, at the bottom or southern part of the Frith of Clyde — not far from the port of ulterior destination; whether it were fifty miles or ninety miles distant is not of extreme importance. In the course of the voyage, six of the crew had been attacked with scurvy, of whom four had been, from the time they crossed the line, confined to their hammocks; and the two others were in a weak state, capable of very little duty; there remained the master, the mate, four seamen, and three apprentices; but the mate seems to have been a drunken fellow. While off Loch Ryan, the wind and tide being adverse to the vessel proceeding up the frith, the master was desirous of going into Loch Ryan, a place with which he was well acquainted, and bring the ship to an anchor at Cairn Ryan, to get more hands. It soon, however, became a dead calm, upon which the vessel stood with her head to sea. Lieutenant Kelly says he observed this, and abandoned the intention of boarding her, until he was informed by a smack that the ship was making a signal for a boat or assistance. He and his men reach the ship about five; and the act on petition states that "at about half-past five it came on to blow a strong breeze from the south, right out of the loch." The master says that

he then proposed to run for Greenock, but that Kelly [ \* 120 ] refused. The \* vessel, after making one or two tacks with a strong adverse wind, was brought up at single anchor about half-past ten, in the bay of Finnest, three miles from Cairn Ryan — seemingly in bad anchorage and on a lee shore. The gale increased during the night, and a second anchor was required. Whether at such time the anchor was over the bow, or not, is immaterial; it at least was not in the hold; so that letting it go was a slight and ordinary operation. The weather having moderated at five, on the morning of the 20th, the lieutenant and three of his men put the master on shore at Cairn Ryan, in order for him to proceed to Stranraer; but he first engaged some fishermen to return to the ship with Lieutenant Kelly; and upon their getting on board they weighed the anchor, and in the afternoon of that day brought her to an anchor at Cairn Ryan, the proper place of anchorage. Lieutenant Kelly remained on board the Clifton till seven, when Captain Lightbody returned from Stranraer, where he had noted his protest and

written to the owners. Such are simply the facts. The salvage service, of whatever nature, was completed when the vessel was brought to an anchor in the bay of Finnest, certainly when at Cairn Ryan. Without then inquiring whether Lieut. Kelly was right or wrong in bringing the vessel into the loch, when the wind changed to the south, what is the amount of service not rigidly scrutinized, and the proper compensation for it?

Now salvage is not always a mere compensation for work and labor; various circumstances upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate \* a salvage [ \* 121 ] reward upon a more enlarged and liberal scale. The ingredients of a salvage service are first, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow creatures, and to rescue the property of their fellow subjects; secondly, the degree of danger and distress from which the property is rescued — whether it were in imminent peril, and almost certainly lost if not at the time rescued and preserved; thirdly, the degree of labor and skill which the salvors incur and display, and the time occupied. Lastly, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*.

How much, then, of the first ingredient existed in this service according to Lieutenant Kelly's own statement? On a fine afternoon in April he saw a ship in the offing as if standing into the loch; then the wind changed and she seemed to stand out; and upon that he abandoned his intention, and it was not until told that she had a signal for a boat that he and his men went out to her. There was no risk, no danger, no enterprise. It has been admitted that the coast-guard is kept for custom-house purposes — to prevent smuggling; was it not then the duty of Lieutenant Kelly to go out and visit or watch this vessel? Persons employed in the public service have, I think, a peculiar duty cast upon them to render aid to the trade of the country; they sacrifice no time from \* any other profitable employment; their time is paid for by [ \* 122 ] the public; they risk no property; for the property they use belongs to the public. It is upon this principle that, in prize salvage on recapture, king's ships received less than private ships; the former received only one eighth, while the latter, one sixth. I do not say that individuals paid by the public are excluded altogether from remuneration when they render an important service to private pro-

perty; but their being so paid ought to cast upon them a peculiar readiness to give assistance, and prevent them from setting up exaggerated demands for trivial service.

Again, secondly, was the property in any peculiar danger? Was the vessel sinking on a dangerous reef, and unmanageable? Nothing of the sort; the vessel was in good trim; she wanted the mere ordinary labor of a few extra hands to pull and haul; and if when she stood in for the loch the wind had been fair for Greenock, (as it soon became,) even extra hands would not have been wanted; there being, with a fair wind up the Clyde, no tack to be made, no sails to be shifted: the master was not disabled; and eight of the crew remained also able to work; they had navigated the vessel the greater part, and almost to the end, of her voyage.

Thirdly, was there any skill or risk, or special labor and length of time occupied in the service? I see nothing but what any half dozen fishermen might not just as well have effected, nay, in this instance, better perhaps; for they would have followed the directions of the master, who was quite able to retain the management of his vessel, and was well acquainted with the place. True, with [ \* 123 ] \* a wind blowing directly not of Loch Ryan, it was a matter of difficulty, and of some risk to this vessel, to be working into the narrow entrance of the loch; and the event proved it, for unable on that day to reach Cairn Ryan, the ship was brought up in unsafe anchorage, as I have already noticed. Lieutenant Kelly himself admits, in his second affidavit, that the salvage service was then at an end; for he insists that the fishermen, who were employed on the next day to weigh the anchors and remove the ship to Cairn Ryan, are not salvors, but are laborers, and that four shillings apiece is an ample remuneration.

I am unwilling to found any part of my judgment in this case upon an imputation of misconduct in Lieutenant Kelly in taking this vessel into Loch Ryan. Certainly, if a few seamen, not belonging to the public service, had come off to the assistance of this vessel, Captain Lightbody would have run on to Greenock: and it is admitted that there was a southerly wind—the fairest that could have blown from the heavens for that port. However, it is not necessary for me to consider that part of the case further than to observe, that the opinion of many nautical men is clear and express, that Lieutenant Kelly ought to have run before the wind to Greenock.

The subsequent acts, such as a boatman remaining on board, lending a boat to the owners, supplying the ship with water and provisions, while the vessel was lying in perfect safety in Cairn Ryan, are immaterial and do not amount to a salvage service; they

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The Clifton. 3 Hagg.

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might proceed from attention and civility, and have at least been remunerated. 5*l.* to the lieutenant, and half a \*sove- [ \*124 ] reign to each of the boatmen, have balanced that after account. For the other service, I cannot consider that it requires a reward of magnitude; it was little better than mere work and labor; and I am of opinion that 50*l.* is a sufficient compensation, and ought to have been accepted. I pronounce for the tender. The subsequent costs must be paid by those who improperly refused it.

*Addams* applied to the court to allow the 50*l.* paid into the registry, by the owners, as the tender, to stand *pro tanto* for costs; he said that as the salvors, were resident in Scotland, there might be a difficulty in obtaining the costs.

SIR J. NICHOLL. Perhaps on the next court day the owners will declare they will accept the 50*l.* in lieu of the costs; they should act liberally. Let the matter stand over.

From the terms of the decree it seems that the question of costs was reserved. The decree was entered to this effect:

The judge, by interlocutory decree, pronounced the tender of fifty pounds, heretofore made to Fielder's parties (the salvors) for their services to the ship, to be sufficient; and, at petition of Fielder, reserved the question of costs to the next court, and in the mean time directed the sum so tendered, and remaining in the registry, not to be paid out of Fielder's parties.

*F. Clarkson* (proctor for the owners) prayed the judge now to condemn Fielder's party in costs. *Fielder* objected thereto. The judge, having heard advocates and proctors on both sides, \*condemned Fielder's parties in the sum of 50*l.* *nomine ex-* [ \*125 ] *pensarum*; and, at petition of *F. Clarkson*, decreed the tender of 50*l.*, heretofore made, and remaining in the registry, to be paid out to him, in part discharge of his parties' costs.

From the decree on the 22d of January, the proctor for the salvors interposed an appeal upon the 24th. The *præsertim* of that appeal was, in substance, from the tender being pronounced sufficient, and from every thing following therefrom.

On the 17th of September, the petition of Fenton and Fielder, on behalf of the appellants, to refer the appeal, was presented to H. M. in Council, and being referred to the judicial committee, the usual inhibition and citation issued. On the 7th of November, (the first



session of Michaelmas term,) Fenton exhibited proxy, and returned the inhibition and citation. F. Clarkson appeared for the respondents, (the owners,) but under protest; and in an act on petition alleged,<sup>1</sup>

That on the 22d of January, the Right Hon. the Judge pronounced the tender of 50*l.*, thentofore made to Fielder's parties for their services, to be sufficient, and, at the petition of F., reserved the [ \* 126 ] question of costs to the next court, \* and in the mean time directed the sum so tendered and remaining in the registry not to be paid out; that on the 15th of February he, F. Clarkson, prayed the judge to condemn Fielder's parties in costs, in the presence of Fielder, who objected thereto; when the judge, having heard advocates and proctors on both sides, condemned Fielder's parties in the sum of 50*l. nomine expensarum*, and at the petition of F. Clarkson decreed the said tender of 50*l.* to be paid out to him, F. C., in part discharge of the costs of his parties; in pursuance of which, he subsequently received the said sum out of the registry; that on the 17th day of September last, Fenton and Fielder, the proctor of the salvors, presented a petition, &c., and praying that the said appeal of the 24th of January may be referred to this court, (namely, the Judicial Committee,) which prayer having been granted, the said Fenton, on the 27th of September, prayed the usual inhibition and citation, which issued and were served accordingly; that by such inhibition and citation, and also by the appeal filed in this court, it appears that the said appeal has been interposed from the said decree of the 22d day of January; that the said Fielder neither pretended nor asserted any appeal from the aforesaid decree, but on the contrary acquiesced therein, praying only a mitigation of costs; and that at a subsequent court day, (to wit, the 15th of February,) he again appeared before the said judge in respect to the question of costs, when the said judge, having heard advocates and proctors on both sides, condemned his said parties in the sum of 50*l.* in lieu of full costs. And [ \* 127 ] Clarkson humbly submitted, \* that by reason of the premises, the said pretended appeal was and is null and void in law, and that the said Fielder is legally barred from the prosecution thereof.

<sup>1</sup> The editor has omitted some, and much curtailed other statements, both for and against the protest, as they appear in the printed papers; but he has endeavored not to omit whatever could materially bear upon the peremption of the appeal — a matter of practice so important, that the present notice of it may not be unacceptable to the profession, until the case appear in a more detailed and perfect form in the concluding part of the late Mr. Knapp's Reports of Cases before the Judicial Committee and the Lords of the Privy Council. [3 Knapp, 375.]

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The Clifton. 3 Hagg.

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Fenton denied that either he or the said Fielder hath at any time, or in any manner, acquiesced in the aforesaid decree made on the 22d of January; and he alleged, that the said appeal was duly and lawfully interposed before the notaries public whose names are subscribed thereto, on the 24th of the said month, and hath not been in any manner waived, or abandoned, or perempted. That on the said 22d of January, the question of costs was reserved to the next following court, in order that F. Clarkson's parties might consider whether they would receive the amount of their tender in lieu of costs, according to the intimation or suggestion then made by the said judge, who made such reservation entirely of his own mere motion and accord. That the said Fielder did not pray a mitigation of costs, as untruly alleged by F. Clarkson. That on the aforesaid by-day after the said Hilary term, (to wit, Saturday, the 15th day of February last,) the said F. Clarkson prayed the said judge to condemn his (Fenton's) aforesaid parties in costs generally; and that the said judge thereupon, of his own mere motion and accord, refused so to do, but condemned his (Fenton's) said parties in the said sum of 50*l. nomine expensarum*; and, at the petition of the said F. Clarkson, decreed the aforesaid tender of 50*l.* to be paid out to him, in part discharge of the costs of his said parties. And the said Fenton expressly alleged, that the said Fielder, though at such time present in court, did not take any part whatever \* in or with reference to the [ \* 128 ] proceedings had in the said cause on the said day, nor instruct any counsel, as it would have been his duty to have done, had not the said cause been appealed. That no counsel having been instructed on behalf of the salvors, they could not in any way be barred by any thing done by counsel, but that, in fact, what took place is as follows:—that the counsel for the owners having on such occasion, inadvertently and through error, stated that the decree on the 22d of January, condemned the salvors in costs, or to that effect, one of the counsel, who had been at the hearing engaged on their behalf, did without instructions, correct such erroneous statement, by informing the judge, as the fact was, that the question of costs had been expressly reserved, or to that effect. Wherefore Fenton humbly submitted, that the appeal in this cause was not, and is not, in any respect null or void in law, and that the appellants are not in any manner barred from the prosecution thereof. He moreover submitted, that, even if the salvors had, on the 22d of January, prayed the court to reserve the question of costs, or had on the 15th of February, objected to their being condemned in costs, or had been heard by their proctor and counsel in support of such objection, such act or acts would not have been an acquiescence in, or in furtherance of, the said decree appealed from, so as to bar the prosecution thereof.

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The Neptune. 3 Hagg.

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The act on petition was further written to on both sides; in the course of which it was admitted by Fenton that, being accidentally in court on the 15th of February, he communicated to the [ \* 129 ] said salvors' counsel that he had heard of \*an intention, on behalf of the owners, to represent some part of the salvage transaction to the admiralty, and that the said advocate, (without, however, any instructions to appear then as counsel,) may have stated generally to the court that the decree prayed for might operate prejudicially, but without adverting to any circumstances in support of such remark, or to induce the court to mitigate the costs.

The proctors on either side, made an affidavit in support of their several averments.

There does not appear to have been any intimation, on the 15th of February, to the counsel for the salvors, at the hearing, nor to the court, that the appeal from the decree of the 22d of January had, on behalf of the salvors, been instituted.

The case was argued, before the Judicial Committee, by *Addams* for the protest; and by *Lushington, contra*. Protest sustained.<sup>1</sup>

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NEPTUNE,<sup>2</sup> Cumberlege.

February 7, 1834.

Payment to material men out of proceeds in the admiralty registry decreed. The owner was a bankrupt, and no appearance was given by him, or his assignees, but the payment was resisted by a mortgagee of the ship, and, on appeal, the decree was reversed.

Warrant of arrest of ship is notice to all having an interest.

Court of Admiralty has no jurisdiction in questions of mortgage.

Generally, the Court of Admiralty is governed by the civil law, the law marine, and the law merchant.

Material men cannot arrest an English ship for cost of materials supplied in England.

THIS was a cause promoted by Messrs. Sims, rope-makers, for payment of materials supplied to the above ship, out of proceeds, remaining in the registry, from the sale of the ship, her tackle, apparel, and furniture.

*King's Advocate* and *Dodson*, for the claim.

*Phillimore* and *Addams, contra*.

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<sup>1</sup> [See the report, 3 Knapp, 375.]

<sup>2</sup> [S. C. on appeal, Id. 94.]

## \* JUDGMENT.

[ \* 130 ]

SIR JOHN NICHOLL. Since this case was argued on the last court day, I have looked into the cases and authorities referred to in argument, and also into some other authorities upon the subject; and as the question at issue is of some importance, not only to the individuals concerned in the cause, but to the commercial public at large, and the mercantile interests of the country in general, I have been anxious to give it the best consideration in my power. It is proper that I should, in the first place, state the facts out of which the question arises, and the proceedings in the cause.

The Neptune—a vessel of considerable value, the property of John Cumberlege the younger—sailed in October, 1831, from this country for India; she there performed several voyages, earned considerable freight, and returned to England in May, 1833, having been absent about a year and a half. Soon after her arrival the vessel was arrested under warrants from this court, in different actions for seamen's wages; and, no bail being given, she was, after the usual steps, sold; the proceeds, 6,000*l.*, were brought into the registry of this court, and (save a sum of 1,500*l.* paid out in the several actions for wages and costs) now remain therein.

The owner of the vessel having become a bankrupt, Messrs. Sims & Co., rope-makers, and creditors for cordage supplied for the outfit of this vessel,—a class of persons known in the language of this court as material men—arrested the proceeds, claiming a lien upon them, and to be entitled out of such proceeds to the payment of their bills in preference to other creditors. The assignees of the \* owner have, up to this time, given no appearance to resist [ \* 131 ] these claims; but on the 8th of January, 1834, Mr. Hodges, in the character of mortgagee in possession, for so he is described, appeared, and denying the right of Sims & Co., as material men, to payment out of the proceeds, prayed to be heard on his petition in support of that denial.

The petition stated, that Mr. Cumberlege was indebted to Mr. Hodges in the sum of 6,000*l.*; that in November, 1831, after the vessel had sailed for India, Cumberlege executed a mortgage of it to Hodges for that sum, and in December, 1831, a further mortgage for 2,000*l.*, in which he was indebted to him upon their partnership account as stockbrokers: these mortgages were subject to redemption upon repayment of those sums before the 1st of November, 1832. The petition further stated, that on the return of the ship in May, 1833, Mr. Hodges took possession of it and of the register; that on the 1st of June the mortgage was indorsed on the register as directed by the 6 Geo. IV. c. 110, s. 46, and the act on petition submitted,

that under these circumstances the mortgage had been foreclosed, and that Mr. Hodges was to all intents and purposes owner of the vessel.

These are the principal facts ; upon which, before I proceed to consider the point of law in the case, I will make a few observations. In the first place, this is not a question whether a material man has a lien upon the ship in specie, but whether he has a lien upon the proceeds of sale now in possession of the High Court of Admiralty, under the authority of which such sale had been effected. In the next place, the proceeds are in this court by default of what [ \* 132 ] ever person was in \* the possession of, and had an interest in, this ship — whether owner or mortgagee ; for had bail been given to the actions for wages, the ship would not have been sold, but have been delivered up, upon the removal of the arrest, to the party previously in possession, whoever he might have been. The warrant of arrest calls upon all persons who have an interest to appear and show cause ; and if the party in possession, at the time the warrant was executed, is no longer in possession, it is, I repeat, his own default ; he has, by not appearing to give bail, acquiesced in being dispossessed, and has thus allowed the proceeds arising upon the sale of the ship to come into the registry of the court. It is, therefore, by the party's own act that the vessel had been converted into proceeds.

In the next place, the mortgagee does not intervene alleging that the bill of Sims & Co. is fraudulent, or that the supplies were not furnished, or that they are overcharged ; but the allegation is, that Messrs. Sims have no lien on the proceeds, and have, in this court, no *persona standi*. Mr. Hodges further asserts, that the mortgage has been foreclosed, and that he, as mortgagee, is, to all intents and purposes, the owner.

Now, upon questions of mortgage, the Court of Admiralty has no jurisdiction ; whether a mortgage is foreclosed — whether a mortgagee had a right to take possession of a chattel personal — whether he is the legal or only equitable owner — and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is past ; the decision of these questions belongs to other courts, they are not within the jurisdiction or province of the Court of [ \* 133 ] Admiralty, which never decides on questions of property between a mortgagee and owner.

The 6 Geo. IV. c. 110, was however referred to, as tending to establish the position that a mortgagee, in possession of the ship, becomes the owner ; but the effect of the 45th and 46th clauses of

that act, taken together, seems to me exactly the reverse. The 45th clause is thus : "And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees, for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not, by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof; nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise, for the payment of the debt or debts for \*securing the payment of [ \* 134 ] which such transfer shall have been made."

The 46th is as follows : "And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid; but that such mortgage or assignment shall take place of, and be preferred to any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding."

The effect of these clauses of the act is, that when the transfer of

a ship to a mortgagee is as a security for a debt, which I apprehend was the case in the present instance, such a transfer will not convert the mortgagee into owner, but still will prevent the bankruptcy of the mortgagor from defeating the security of the mortgagee; [\* 135] in such an event \* the statute secures to the mortgagee a power over the ship, by sale or otherwise, for the payment of his debt: it gives to him, under such circumstances, a special lien — a priority of payment; and this will account for the assignees of the bankrupt not interposing in this case, if they are satisfied that the debt of the mortgagee is beyond the value of the proceeds of the ship. Whether this priority of payment and power of sale will constitute the mortgagee owner, admits, I think, of considerable doubt; but here it is not necessary to determine that question, nor whether the mortgage was foreclosed. It will be more satisfactory to the parties in this suit, and more beneficial to the general mercantile interests of the country, to decide whether a mortgagee — be he considered owner or *quasi* owner — has a prior claim to material men in the proceeds remaining in the registry of the court. Of course the mortgagee can have no greater rights than the mortgagor — the owner himself; if the owner cannot defeat the right of material men in respect of proceeds, neither can his representative, nor assignee, nor transferee.

In order, then, to arrive at a satisfactory decision upon this case, it is necessary to trace up the principle of lien to its source, always remembering that the question now to be decided, is a question of priority of lien, between the owner, or his representative, and material men, against proceeds in the possession of the Court of Admiralty, and not against the ship itself.

The Court of Admiralty, holding, as it does, the proceeds *in usum jus habentium*, must decide the question according to that law by which the court is governed; for it is not competent to the [\* 136] court, and it has not jurisdiction to administer any other \* law than its own. Generally, then, the Court of Admiralty is governed by the civil law, the law marine, and law merchant, unless where those laws are controlled by the statute law of the realm, or by the authority of the municipal courts, which unquestionably possess a superintending power, and might restrain this court, should it overstep the just limits of its jurisdiction. If then, in any matter the municipal courts have prohibited the Court of Admiralty, it is bound to acquiesce not only in that individual case, but in all others where the same point arises; and thenceforward the civil and maritime law, so controlled, becomes the law governing the decisions of this court.

By the civil law, the original law of the admiralty court, until

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corrected and restrained, it is quite clear that a material man has a lien not only upon the proceeds but upon the ship itself: this is very clearly laid down by the late Lord Tenterden, when treating on charges upon the ship *in specie*.<sup>1</sup> "Every man who had repaired or fitted out a ship, or lent money to be employed in those services, had, by the law of Rome, and still possesses in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege, or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to such claim;" and in support of his position, the learned writer refers, in a note, to the Digest, the Novells, the French ordinance, and to other authorities; so that nothing can be more clear than that persons in the situation of material men had \* by the civil law [ \* 137 ] what was termed *privilegium post fiscum*, and a lien both on the ship in specie as well as on the proceeds of the ship.

The treatise thus proceeds:—"This privilege exists in France, not only while the ship remains in the possession of the owner, but even after a sale to a third person for some period of time. Lord Mansfield is reported to have said generally, in a case depending for judgment in the Court of King's Bench," (and it is almost needless to remark that Lord Mansfield was peculiarly conversant with the learning of the civil law, and with those authorities which are the foundation of the law merchant of this country; and his opinion was, that under the English law,) "a person who supplies a ship with necessaries, has not only the personal security of the master and owners, but also the security of the specific ship." And Lord Tenterden refers to the case of *Rich v. Coe*, reported in Cowper, 636; and also to *Farmer v. Davis*, 1 Ter. Rep. 109. The cases here quoted I have carefully examined, and they fully support the reference made to them. But the learned author then proceeds:—"In a recent case, to which I have more than once had occasion to refer, Lord Kenyon, alluding to two cases that will be presently mentioned, expressed a doubt whether the doctrine of Lord Mansfield on this subject was not too generally laid down;<sup>2</sup> and upon a view of the decisions which I am about to quote, one of which was pronounced by Lord Mansfield himself,<sup>3</sup> it appears that the law of England has not adopted \* this rule of the civil law with regard to repairs [ \* 138 ] and necessaries furnished here in England."<sup>4</sup>

<sup>1</sup> Abbott on Shipping, p. 108, 5th Ed.

<sup>2</sup> *Westerdell v. Dale*, 7 T. R. 312.

<sup>3</sup> *Wilkins v. Carmichael*, Dougl. 101.

<sup>4</sup> See also Lord Stowell's observations in the case of *The Zodiac*, 1 Hagg. Adm. Rep. 325.



That is the length to which Lord Kenyon went on the authority of the cases just cited, and it is well known that that distinguished judge was less intimately acquainted than Lord Mansfield, with—and perhaps from that circumstance, as well as from his exclusive attachment to the municipal law of this country, less favorably disposed towards—that more extended system of law, which primarily regulates the affairs of commerce and the intercourse of nations. “A shipwright, indeed,” says Lord Tenterden, “who has taken a ship into his own possession to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor, smith, or other artificer, in regard to the object of his particular trade. Bland, *ex parte*, 2 Rose, 91. But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessities for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands.”<sup>1</sup>

All the cases go to the question, whether material men have any lien upon the ship itself. Lord Eldon, indeed, would seem to have entertained a doubt whether even if a shipwright retained possession, he had a priority or lien upon the ship, and he sent a [\*139] case for the opinion of the Court of \*King’s Bench upon that very point. The case of *Franklin v. Hosier*,<sup>2</sup> was accordingly argued, and the certificate of the Court of King’s Bench, was to this effect:—“That the shipwrights, having the ship in their actual possession in their dock at the time of the owner’s bankruptcy, had a lien on the whole ship.” This, therefore, is a direct authority, to show that a shipwright has to that extent a lien on a ship.

Then, under the authorities referred to by my Lord Tenterden, if this were a proceeding against an English ship *in specie*, and not against the proceeds in the registry arising from a sale, the material men could not have prosecuted their suit for the costs of materials supplied in England. I say for materials supplied in England, because the court is not disposed to depart one step further than the authorities have already departed from the general marine law, which is in a great measure founded upon the common practice of the society of nations, and of which mutuality is the vital principle.<sup>3</sup>

Mr. Justice Blackstone, in his chapter upon the law of nations, has these observations:—

“In arbitrary states, this law, wherever it contradicts, or is not pro-

<sup>1</sup> Hill, *ex parte*, 1 Madd. 61.

<sup>2</sup> 4 Barn. and Ald. 341.

<sup>3</sup> See *The Santa Cruz*, 1 C. Rob. 58, and *Nostra Signora de los Dolores*, 1 Dod. 297—8.

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vided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, (wherever any question arises which is properly the object of its jurisdiction,) is here adopted in its full extent by the common law, and is held to be a part \* of the law of the land. [ \* 140 ] And those acts of parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be a part of the civilized world. Thus, in mercantile questions, such as bills of exchange and the like, in all marine causes relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature, the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So, too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.”<sup>1</sup>

In England, then, the law of nations, of which the *lex mercatoria* is a branch, forms part of the common law, unless it be altered or controlled by parliament or the municipal courts. It is clear that by the civil law, and by the general law of other nations, when uncontrolled, persons who have furnished materials for the fitting out of a ship have a lien upon the ship itself, and, if so, upon the proceeds of the ship. If an English ship were repaired in France or in Holland, material men might there arrest and enforce payment against the ship itself. How far a foreign ship, repaired here, might not be subject to the same right, is a question into which it is not necessary now to inquire, for The Neptune \* is a British [ \* 141 ] ship, and in such case the municipal courts of this country have so far departed from the rule of the civil law, that they have held that the lien does not extend to the ship itself; and so far, therefore, this court is restrained; but they have not gone further.<sup>2</sup> Per-

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<sup>1</sup> 4 Black. Com. c. 5, p. 67, (16th ed.)

<sup>2</sup> Professor Story, one of the justices of the Supreme Court of the United States, in his recent edition of “Abbott on Shipping,” observes, in a note to the 15th section of Part II. c. 3 of that treatise:—“The doctrine of these cases, (namely, the cases commented upon in the text by Mr. Abbott,) is fully confirmed by Lord Eldon, in *Hussey v. Christie*, (13 Ves. 594,) who cites Mr. Abbott’s remarks, with approbation, on the subject of there being no lien on a ship by material men for repairs done in Eng-

haps, before I proceed to examine how far this court is restrained by the municipal law of this country, and how far it is required [ \*142 ] \*strictly to adhere to the law so restricted, it may be fit to consider what was the ancient law of this court upon the point in question ; and, for this purpose to refer to a high authority, which not only states the old law, but clearly points out the importance of not restraining it further than the policy and commercial interests of this country require.

In a report made to the king, a century and a half ago, by Sir Leoline Jenkins, then judge of this court, are the following passages<sup>1</sup>:—

“Those are commonly called material men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision (necessary in any kind.) Those men, when they have furnished any victuals or materials upon the credit of a ship, are certain losers, if they be prohibited from taking their remedy against such ships, by arresting and proceeding to gain a possession of the ship itself till the debt be satisfied, according to the ancient course of the admiralty. If they be put to their personal action against the master only, who employed them at work, or took up their goods, they find him most commonly not worth of his own the fortieth part of what he may, and, in some cases, must take up upon the credit of his ship.

“It is true, it hath of late been held that, such contracts being

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land. Whether this doctrine would be held to apply to repairs on foreign ships, made in England, or only on domestic ships, may be thought by some persons open to controversy. The case of *Justin v. Ballam*, (Salk. 34 ; 2 Ld. Raym. 805,) is certainly against the lien in either case. But the doctrine asserted in that case, has been overruled in several of our Admiralty Courts. In the brig *Eagle*, (Bee's Adm. R. 78,) Judge Bee decreed in favor of material men against a foreign ship.” The learned editor cites various cases, and then says that more recently (referring to cases in *Wheaton's Reports*) “the Supreme Court of the United States have held, that where repairs have been made, or necessities furnished to a foreign ship, or to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security ; and he may well maintain a suit *in rem*, in the admiralty, to enforce his right.” He also says, “that on several occasions a broader doctrine has been maintained in some of our Admiralty Courts namely, that material men had a lien on the ship for repairs done in a domestic port, and might sue, therefore, in the admiralty.” (1 *Peters*, Adm. R. 223 and 233, *note*, 2 *Gallis B.* 345.) It appears from the same note, that “the legislatures of New York and Pennsylvania have specially provided for material men, shipwrights, and artificers, a lien on the ships furnished or repaired by them.” And that “in Louisiana, a like lien, or privilege, exists in virtue of the general Spanish law.” See also 1 *Summer* (*American Reports*,) 76. [See further cases in *Abb. on Ship.* (6th Amer. ed.) 148, *note*.]

<sup>1</sup> *Life of Sir L. Jenkins*, vol. ii. pp. 746 – 7.

made, and arising upon the land, are declared by the statutes 13th and 15th Rich. II., to be cognizable in the admiralty; yet if those statutes be weighed, together with the suggestions and complaints of the commons, upon which they were enacted, there will not (under correction) be any necessity to extend them any further than

\* the grievances and abuses then complained of; but that [\* 143] the cognizance of contracts and pleas relating to the building, repairing, and furnishing of ships, was not intended to be prohibited by the admirals, may (as I conceive) be well presumed, not only because the things complained of are actions and pleas of matters foreign to navigation, &c., but also that, during the remainder of King Richard II.'s reign, after the making of this act, as also in the reigns of Henry IV. and Henry V., commissions of appeal were ordinarily issued out of chancery, as appears by the records of those years in the Tower, whereby the proceedings and judgments in the admiralty are so far from being complained of, prohibited, or declared as *coram non judice*, that they are referred, as in the ordinary course of appeals, to the examination of delegates.

"It was one of these articles, subscribed by all the judges of the land, and Mr. Attorney-General Noy, before the king, your Majesty's father, of ever blessed memory, in the year 1632; that where a suit is in the admiralty, for building, amending, saving, or victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm. And according to this resolution of the judges, there were several judgments given, and prohibitions denied, at Westminster Hall, in the year 1632, to The Troubles."

These remarks of this very learned judge and distinguished statesman show that proceedings against the ship were formerly entertained, and that material men had a lien upon the ship itself.

\* In spite, however, of his reasoning and of the ancient practice, it cannot be denied that the Admiralty Court, whenever it may since have allowed a proceeding by material men against the ship, has been prohibited; and higher considerations of public policy, and the interests of commerce generally, may have more than counterbalanced the reasons urged by Sir Leoline Jenkins on behalf of this class of persons, so far, at least, as the ship itself is concerned.

The latest cases that I can find in which material men attempted to prosecute, in this court, their demands against the ship, are those of *Hoare v. Clement*, and *Justin v. Ballam*; the first is reported in 2 Show. 342, and which case, as Sir Bartholomew Shower was of counsel, is no doubt accurately reported; the latter is reported in Salk. 34,

and more fully in 2 Lord Raymond, 835. Of these cases, the former was decided towards the end of the reign of Charles II., and the latter in the beginning of the reign of Queen Anne; since which time, I believe that this court, in deference to these decisions of the municipal courts, has never attempted to proceed *in rem* against the ship itself.

It is true, that a lien on personal chattels follows possession only, and is lost when that possession is parted with; for, of personal chattels, possession is, *prima facie*, evidence of property. Wherever a question has been raised in the municipal courts, the principle of the municipal law has been pursued, excepting where Lord Mansfield was of opinion, in the cases already referred to, that material men had not only the remedy of the master and the owners, but also had the security of the specific ship. However, the general rule is, certainly, that material men cannot proceed against the ship, [ \* 145 ] \* and that rule has been recognized in chancery by Sir Joseph Jekyll, by Lord Hardwicke, and by Lord Eldon, all of whom, sitting in municipal courts, applied to claims by material men the principle of the municipal law.

It is not to be denied that, in the case of a British vessel, material men, without possession, have no lien on the ship itself; and it has been argued that if they have no lien on the ship, they can have none on the proceeds of the ship; but that is not a necessary consequence; there are many points of difference. First, the owner, in this case, has not possession of the ship, nor of the money paid as the proceeds of sale into the registry of this court; he voluntarily lost the possession by due course of law — by neglecting to give bail to the action for wages. Had he given bail, he would have been reinstated in the possession, whereas by his own omission, and under the sale decreed by this court, he has suffered the proceeds to pass into a different possession, namely, into the possession and custody of a court governed by the civil and marine law, except in as far as it is controlled and restrained by the municipal law. Hence arises another great point of difference; that whereas the rule of the ancient law, and of the general marine law — that material men had a lien on the ship, has been restrained by the municipal law; and whereas this court having been prohibited in suits at the instance of material men against the ship, yet the ancient law has never been controlled, nor has this court ever been prohibited with respect to such suits against the proceeds.

Those are in the possession of a court which, proceeding [ \* 146 ] according to the civil law, \* holds them *in usum jus habentium*.

By what law then, are the *jus habentes* to be ascertained? By its own law, unless that law has been controlled *graviori jure*;

it has been controlled in regard to ships, but never in regard to proceeds.

Again, it is said that the same reasons apply both to ship and to proceeds, but this is by no means the case. With respect to ships, great reasons of public policy may, in a country of most extensive commerce and navigation, interpose and induce the application of the municipal law, which prohibits the arrest of the ship, and proceedings against the ship *in specie*; and this was the great principle of the statute of Richard II.; for if every person who supplied any necessary to a ship, had the right at any time to arrest her, vessels would hardly ever be able to sail without paying the uttermost penny, and in many cases would be exposed to the most extortionate demands; they would be liable to be arrested and detained from caprice or malice, and merchants would hardly venture to charter a vessel. This would be a great interruption to the navigation and commerce of the country, and forms adequate grounds for prohibiting the arrest of a ship *in specie*. But this inconvenience does not apply to proceeds remaining in the registry; here, the ship having been sold, no interruption is given to trade, but it is a bare act of equity and justice to give a preference to the lien of material men, and such a course will be in conformity to the ancient rules of this court, of the civil law, and of the law merchant.

This interruption to commerce and navigation is the reason assigned by Mr. Holt, in his work on shipping and navigation, for the application of \* the rule, in respect of lien on ships, adopted [ \* 147 ] by the municipal law of this country: — “ The other reasons why ships are not the subjects of such specific liens is, that it would open a door to the manifest mischief of commerce, and would be an impediment to the most valuable article of public and private property, if either the master, for any stores supplied by himself, or any of the dealers with the ship, could arrest the departure of the vessel for accounts afterwards litigated, or of small amount. Under these principles, therefore, the law of England rejects almost wholly the doctrine of lien as regards ships.”<sup>1</sup>

Another equitable claim in material men to preference arises from this consideration. It may often happen, and sometimes to a great extent, that a very large proportion of the proceeds is produced by the very materials for which the tradesmen seek repayment. The ship may just have been repaired, very valuable materials may have been

<sup>1</sup> Holt “on the Shipping and Navigation Laws of Great Britain,” part ii. c. iii. p. 229, 2d edition.

expended, the ship is sold through the default of the owner of the vessel, or in consequence of his bankruptcy, and the proceeds, arising principally from the recent expenditure, are remaining in the registry; surely those who furnished the materials, which created this increased value, have an equitable title to preference as against the owner, as against other creditors, or as against the mortgagee of the ship; for he can be in no better situation than the owner himself.

Lastly, it has been the practice of this court to pay material men out of the proceeds, and that practice has been traced to exist considerably above half a century.

In the case of *The John, Jackson*, 3 Rob. 288, it was decided, after considerable discussion, on the authority of the case of *The Adventure*, in 1763, that material men had a kind of lien, and were entitled to be paid out of the proceeds in the registry; and I perfectly recollect that that was not the only case mentioned; and Dr. Swabey, than whom no advocate then at the bar was better informed, stated, that other similar cases might be found.<sup>1</sup> In the same case — *The John* — The court refused to allow the demand of a general creditor to be paid out of the proceeds; but only let in material men on the ground of lien; and that distinction appears to me to be sound, and to be supported by the ancient

<sup>1</sup> 1761. *Wharton, Whisham*. Henry Bird & Co., as furnishers and fitters out of the ship, obtained a decree for 183*l.* 8*s.* 7*d.*; and also Jonathan Eade and another, as furnishers and fitters out, for 68*l.* 12*s.* 5*d.* The ship had been sold upon an arrest for wages, by the surgeon.

\*.\* In this case the balance of proceeds remaining in the registry, after satisfying the above claims, and the claims of the seamen, was paid out to the proctor of the assignees of the owners of the ship. There seems to have been no opposition.

1761. *Barbara, Prodham, Jonathan Eade, and others*, furnishers and fitters out, obtained a decree for 82*l.* 4*s.* This was the whole balance in the registry. There was no appearance for the owner.

1817. *Harmonia*. In *The Harmonia*, upon an application for payment out of proceeds by a provision merchant and a brewer, notice of opposition by the assignees was given, but not persisted in; and the claims of the material men being satisfied, the remaining proceeds were paid to the assignees.

1832. *Bombay, Dare*. In this case Sir Christopher Robinson allowed out of proceeds, 150*l.* advanced by Dodd & Co., ship-brokers, to the master, in order to pay the chief mate. Also a tradesman, who had supplied carpets for the outfit of the ship to the East Indies, with passengers, was paid out of the proceeds. The remainder of the proceeds was reserved by the owners.

1832. *Unity, Dunley*. A ship-agent allowed, by the same judge, repayment out of proceeds of a sum advanced to the captain, and paid as wages. There was no appearance for the owners.

In *The Maitland*, (2 Hagg. Adm. 253,) where the owner appeared and contested a claim of material men, the accounts were disputed, and the court refused the claim. See also *The Portsea*, *ibid.* 88; and *The Flora*, 1 vol. 298.

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The Neptune. 3 Hagg.

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law and policy of the court. It is admitted that such has since been the common course; but it is said that the court has not in any case gone the length of declaring that material men have a lien on the proceeds. Such a declaration was not necessary; material men had a lien, according to the civil law and the ancient law of this court, and Lord Mansfield, it would seem, thought that they still retained it upon the ship, and of course upon the proceeds; they have been deprived of that lien as far as regards the ship *in specie*, but no authority of the Municipal Court has hitherto deprived them of the ancient and established remedy against the proceeds. If it could be maintained that material men have no lien, the court would not be justified in paying out at all; the *res* remains in the registry *in usum jus habentium*, the claimants must show a legal title to the property—the *res*, by a lien *in rem*; other creditors have been refused because they had no such title, because they had only a personal claim against the owner who was their debtor.

\* Again, it is said, that payments out of proceeds have [\* 150] never been made to material men, when the owner has appeared and objected. This may be so, because in those cases the owner having appeared may have shown that the claim was fraudulent or not well founded; but is there any case where the court has considered the bare appearance and opposition of the owner to be a sufficient and peremptory ground for refusing to allow the claims of material men to be paid out of the proceeds? If the owner has not usually appeared, the only legitimate inference is, that the law in favor of the claim of the material men has been considered to be settled, and that their claim was just; otherwise no doubt prohibitions would have been applied for, or appeals interposed; for I cannot understand how the court could, in the absence of the owners, pay out money to parties who had no legal claim to the property, and whose demand must have been rejected, *ex debito justitiæ*, on the bare veto of the owners.

This long practice, founded on principle, on the law civil and maritime, on the usage of other nations, and on the ancient practice of this court, unchecked by prohibitions, except in the case of proceedings against the ship itself,—this practice, so founded, and so allowed to grow up, I shall not disturb.

The court pronounced for the claim of Messrs. Sims, together with costs of suit, and that the same should be paid out of the proceeds in the registry.<sup>1</sup>

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<sup>1</sup> This decision, upon an appeal by Mr. Hodges, was reversed by the Judicial Committee. The court did not give costs, and it remitted the cause. See 2 Knapp's Cases before the Privy Council, 94.



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The Ardincaple. 3 Hagg.

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[ \* 151 ]

\* ARDINCAPLE, M'Leod.

January 22, 1834.

Salvage by two smacks, being at anchor, that went out with enterprise and alacrity to a steamer twelve miles from shore, and towed her in, after having taken out and landed her passengers. The court, holding that, in assistance to steam-vessels, with passengers, the reward should exceed a mere proportion of value in ordinary cases, gave 350*l.* out of 1,265*l.*

KING'S ADVOCATE and *Nicholl*, for salvors.

*Dodson* and *Addams*, *contra*.

SIR J. NICHOLL. This was a suit for salvage by two fishing smacks, against The Ardincaple, steam packet, while on her voyage from Leith to Newcastle, on the 1st and 2d of September last. On the 11th, the action commenced and bail was given in 500*l.* On the 21st of November a tender of 250*l.* was made, of which 200*l.* was for salvage, and the remaining 50*l.* for damage, loss, and expenses, together with the costs then incurred. The Ardincaple sailed early in the morning of the 1st of September, with thirty-two passengers and a crew of eight on board, and some goods; the weather soon became boisterous, and the passengers wished the master to put into Berwick; but he declined; and between eleven and twelve o'clock, when between Holy Island and Bamburgh Castle, a heavy sea struck the vessel, and carried overboard every thing upon deck. Seven seamen, including the master, were drowned, and afterwards, two more seamen, washed out of the boat astern, were also drowned. The vessel became unmanageable and was with great difficulty, under the directions of Captain Pearson, a passenger, brought to an anchor within two miles of a lee shore. While in that state, the sea breaking over her, with chimney, main mast, and bowsprit gone, she parted from both her anchors and drove out to sea. The crew, however, having rigged a jury mast with tarpaulins, made signals of distress to [ \* 152 ] several vessels at \* the Fern Islands; but no vessel came out except the smacks. One of these, The Renown, slipped her cable about two on the morning of the 2d, and about four o'clock, being then twelve miles from the shore, succeeded in taking her in tow; two hawsers broke; and upon the wind abating all the passengers got on board the smack with considerable difficulty, and brought to shore. About seven o'clock, The Favorite came up, and having agreed to stay by the steamer, put two of her own men on board, supplied her

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The Adventure. 3 Hagg.

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with some ropes and a spare sail, took her in tow, and in about two hours brought her into Shields. The value of the ship and cargo is 1,265*l*. Such are the material facts; and the question is, whether for this salvage the tender is sufficient.

In a recent case,<sup>1</sup> I stated the ingredients which enter into consideration in establishing a salvage service; and for the most part I think that they concur in favor of the present salvors. The smacks were at anchor sheltered from the storm, they went out with great enterprise and alacrity, The Renown even slipping her cable. The vessel saved was in a most perilous state; it is difficult to suppose one more so. There was also great risk in taking the passengers out of this unmanageable vessel; for though the storm had abated, the sea was much swollen and agitated, and therefore a meritorious service was performed in extricating them—the vessel being then twelve miles from the shore.

It is true that the ship and cargo are of no great value, but in cases of steamboats, that is \* not the consideration; [\* 153] they are a very peculiar species of vessels, making large profits, and they are not merely to pay for services, as if only carrying ballast; humanity requires that every possible encouragement in the way of liberal reward should be given in order to induce a prompt and efficient assistance to them, and the reward must be beyond a mere proportion of value in ordinary cases. Under all the circumstances I shall allow 350*l*., which will include a compensation for loss of time and damage. The owners also will pay the costs.

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ADVENTURE, Young.

January 30, 1834.

Actions for wages consolidated. Suit by master for wages when mate.

SEVERAL actions for wages. The master sued for wages due to him as mate; and, on the fourth default being granted, *Addams* moved that the actions be consolidated. He cited *The Favorite*, 2 Rob. 232. Decreed.

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<sup>1</sup> See *The Clifton*, *supra*, 120.

## BRITANNIA, Plash.

January 30, 1834.

Derelict. Moiety awarded. Expenses of appraisement out of the other moiety.

THIS ship, of 350 tons, on a voyage with deals and iron, from Russian Finland to Bordeaux, was found derelict, on 5th of September, about eight leagues off Orfordness, by four smacks, together having twenty-four hands, and brought into Harwich. The owners having alleged the value to be 800*l.*, a commission of appraisement was granted, the cargo unlivered, and the value of ship and cargo returned at 1,729*l.* 15*s.*

[ \*154 ] \* *King's Advocate* and *Nicholl* applied for a moiety, not deducting from the gross value the expenses of the appraisement and unlivery.

*Addams* and *Haggard*, *contra*.

SIR J. NICHOLL. It is a case of great merit and danger; the owners are fortunate in getting back any part of this property. I shall decree one half to the salvors; and the only consideration is, whether the expenses of the appraisement and unlivery should be first deducted; I think that they should not; the expenses of the unlivery must at all events have been incurred before the voyage could have been further prosecuted. The other costs and expenses should be, as usual, deducted in the first instance. I do not know a case, except for salvage to a king's ship, or the property small, where the court has exceeded a moiety.<sup>1</sup>

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<sup>1</sup> *Infra*, 167, 168.

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The *Lustre*. 3 Hagg.

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LUSTRE,<sup>1</sup> Finlay.

February 7, 1834.

A government steamer assists a merchantman on a stipulation to reimburse all expenses arising from damage to the steamer or the stores ; such a stipulation is no bar to a salvage compensation.

SALVAGE by H. M. steamer, *Dee*, Edward Stanley, Esq., commander. Action entered on behalf of the commander, officers and men, (being one hundred and thirty, including engineers and boys,) in 300*l*. The services lasted about nineteen hours. The value of *The Lustre* and her cargo was 1,100*l*. The use of the steamer was applied for by the owners, and despatched by order of Sir Thomas Maitland, the admiral superintendent at Portsmouth, "upon the express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged." The owners alleged that "this stipulation [\*155] barred the officers and men from a claim to salvage. Captain Stanley disclaimed any intention of sharing in the remuneration.

*King's Advocate*, for the claim.

*Dodson*, for the owners.

SIR J. NICHOLL (in the course of his judgment) said : — It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense ; these government steam-vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals, and thus risk the public property without authority, or an indemnity for all expense and damage. Here there was a stipulation given, upon the admiral at Portsmouth allowing *The Dee* to be so employed ; but it has nothing to do with a reward for personal service ; it was never so intended, and cannot on principle be so maintained ; there might, in the service, have been a great exposure of life, and there was much of risk and labor. Without the authority of the admiral the owners could not have had the assistance of this steamer, they must have got one elsewhere ; but his permission

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<sup>1</sup> [As to salvage by government vessels, see *The Mary Ann*, 1 Hagg. Ad. R. 158, note.]

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The Eugene. 3 Hagg.

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cannot bar the claim of those who were employed in her to be rewarded; it cannot destroy their right to reward. In *The Mary Ann*,<sup>1</sup> a king's ship was held entitled; and why are officers and crews to hazard their lives, or undergo labor to save the owners of merchant ships from the expense of hiring private steamers, or resorting to other means? I am clearly of opinion that officers and men [ \* 156 ] so \* employed, and who perform essential service, are entitled to reward as much as in the case of recapture; in that description of cases they received less than the law gave to privateers; so here the condition to reimburse all expenses, in case of damage, is a reason for a less reward than where a steamer goes out on private risk and enterprise. The only question then is as to the *quantum* : — 100*l.* is as little as I can give, and the expenses.

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EUGENE, Bourne.

February 15, 1834.

Of two sets of salvors, the first in possession claimed salvage, summarily, before magistrates; the second, cognizant of such claim, sued here by action. The owners appealed from the magistrate's award; and the court, rejecting an application on the part of the owners not to hear, on appeal, until the case of the second salvors was ready for adjudication, affirmed the award; and, subsequently, dismissed the action, holding, first, that the second salvors ought to have intervened before the magistrates; and secondly, that they had failed to prove either an adoption of their services, or incompetency in the first possessors.<sup>2</sup>

THIS American vessel, in ballast, got on the Gunfleet sand, on the 27th of October, and was abandoned by the master and crew. On the morning of the 28th, eight smacks and thirty hands took possession, and worked at her. In the course of the day she was visited by other smacks and boats; but their assistance was refused and they went away. About one o'clock, two, and between five and six in the evening, eight more smacks came and coöperated; the vessel was got off that night, taken into the river Colne, and on the morning of the 30th, the service was finished.

On the 1st of November, the eight smacks applied to the magistrates at Colchester for salvage; they appointed to hear on the 13th;

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<sup>1</sup> Hagg. Ad. R. 158. .

<sup>2</sup> [As to second sets of salvors, see *The Maria*, Edw. 175, note.]

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The Eugene. 3 Hagg.

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and on that day, the claim was heard in the presence of the owner's agent, who offered no objection; and 200*l.* was awarded, besides costs. The whole value was 420*l.* The ten smacks arrested the ship, by a warrant from this court, on the 4th of November; and on the 8th, served a notice to stop the magistrates. [\* 157] The owners did not disapprove of the award (if it were to cover the whole service); but they appealed in order to dispose of the action by the ten smacks; they gave bail both to the award and the action.

In Hilary term, *Nicholl*, for the owners, applied to have the question of the award and appeal postponed till the act on petition of the ten salvors, and affidavits, were complete; but after hearing him on this point, and as to the extent of the award under §§ 7 and 8 of 1 & 2 Geo. 4, c. 75, and the *King's Advocate* for the eight salvors, the court affirmed the award, with costs, (the award being the only matter of appeal,) so far as respected the sum due for salvage, reserving all questions whether, as to the merits of the ten smacks, their competency to sue by a separate suit in a separate tribunal; and, a further amount even, if entitled, as to salvage.

The whole case afterwards came on.

*Addams*, for the ten smacks. The magistrates have been guilty of an attempt to infringe this jurisdiction. This court was in possession of the cause; we were the majority, and had arrested the ship. If the owners are prejudiced, it is their own fault, for they were aware of the warrant, and should have withdrawn from the magistrates' jurisdiction; the owners and the first salvors have colluded to defeat the second salvors.

PER CURIAM. You were cognizant of the proceedings before the magistrates; should you not have interyened? You admit the eight smacks to have been first in possession; can you sustain that salvors first in possession of a derelict, and carrying her to the jurisdiction they think fit, are \*stopped by a warrant of arrest [\* 158] from those *assistendo*? There is in this court a remedy by appeal, if justice be not done to all parties; but the Salvage Act has given to magistrates a jurisdiction, and prior possessors are authorized to resort to that jurisdiction.

*Addams*. Suppose the prior possessor were a single fishing smack, and that forty others came to assist, should their interests be intrusted

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The Eugene. 3 Hagg.

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to the choice of the first salvor? Here the two sets of salvors are nearly equal. He cited *The Maria*, Kilstrom,<sup>1</sup> and *Blendenhall*,<sup>2</sup> as to possession by successive salvors.

*King's Advocate.* It is said that the majority should choose the forum; but the accessory must follow the principal; and the legislature having provided for a summary adjudication, a resort to magistrates, the first possessors were entitled to go before them. This suit has drawn them into fresh proceedings, and kept them out of their salvage; they claim the whole reward. In *The Kilstrom*, it was held that it was not sufficient that, in the opinion of the first salvors, further aid was not wanted, but that the circumstances must justify that opinion. The assistance of the ten smacks was not here required. The decision in *The Blendenhall* is unfavorable to second claimants, except, perhaps, as to a single *dictum*. That was a case of great value; but *The Challenger*, brig, was held by Lord Stowell not entitled to share, because, as here, there was neither an actual nor apparent necessity for interference with the first in possession.

[ \*159 ] *Nicholl*, for the owners. Imputed misconduct to \*the magistrates, and imputed collusion to the owners and first salvors, are totally destitute of proof. There is nothing to show that the owners were cognizant of any objection to proceed before the magistrates; but if they were cognizant, they had a right to follow the *partes principales*. That is a principle which runs through the whole body of the civil law. *Wood v. Medley*, and the authorities there cited.<sup>3</sup> The second set of salvors had no right to institute a separate suit in a distinct forum. Take a case in which there were no *bona notabilia*, and the executor should resort to the Prerogative Court, and the legatee to the Consistory of London—it would be difficult to suppose that the legatee could select a different forum from that chosen by the *legitimus contradictor*. After commenting on *The Blendenhall*, he contended that the interference by the second salvors was unnecessary, and that they should pay the costs of their action.

SIR J. NICHOLL. (After stating the undisputed facts, the proceedings, and dates.) The first question is, whether the eight smacks did wrong in proceeding before the magistrates. They were the first possessors; they had an inchoate right to the vessel; whoever might

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<sup>1</sup> Edwards, 175.

<sup>2</sup> 1 Hagg. Eccles. Rep. 647 *et seq.*

<sup>3</sup> 1 Dod. 414.

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The Eugene. 3 Hagg.

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come afterwards, they would only be admitted as salvors either by the sanction of the first possessors, or by the necessity of the case. I am of opinion that the eight had a primary interest; they had, then, a right to choose their own jurisdiction — to proceed before the magistrates; and the ten ought to have made their claim before \*them. I do not say that, if parties have equal rights, a [ \*160 ] resort to the subordinate jurisdiction, when objected to, would be proper, but here the claim for the interposition of this court, in opposition to the other forum, is not sustained by any of the circumstances. The intention of the legislature was to give, particularly in small cases, a speedy and cheap remedy; and if there had been any partiality or injustice, the second salvors had a remedy by appeal; but I cannot, from these proceedings, see any grounds of complaint.

The next question is, whether the ten smacks have made out a claim to any salvage. The first eight being in possession, the *onus probandi* is upon those who came afterwards; they must show, most clearly, either an adoption of their services, or an incompetency in the first occupants to effect the salvage — an absolute necessity for their interference. There is a number of contradictory affidavits, as usual; but even in the first affidavit of the ten smacks, made on the 2d of November, it would appear that, about five or six P. M., eight went on board in a body, and insisted on a right of interposing as salvors; but by that hour the chief work was done. There is no proof that satisfies me that further assistance was required; and what strongly, in my opinion, confirms that view, is, that other boats had, early in the day, been rejected. It is not suggested, and it is positively denied, that there was any consent to accept the aid of the ten boats; the eight resisted so far as they could with effect; they objected, but could not prevent; therefore I see no proof of a consent, but, on the contrary, there was a mere acquiescence, a submission to which they were obliged, from the ten \*being superior in [ \*161 ] number. What necessity has been shown? What was required to be done, or what was done, that the eight smacks and thirty hands could not have done?<sup>1</sup> The salvors may contradict each other; but there are facts spoken to by the eight, and also by two Harwich men who were spectators, who make no claim, and against whom I have heard nothing but that they are marksmen; and if the conduct of the men belonging to the ten boats were as it is represented, it has been improper. Their proceedings in this claim seem to me to bear out that representation; they do not claim,

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<sup>1</sup> See *The Effort*, 165.



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The Calypso. 3 Hagg.

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*recenti facto*, at Colchester, but come here, impede arrangements, and enhance expense, and have failed, in my opinion, to make out even a specious case for interference. Their assistance was unasked for—it was unaccepted—it was obtruded. Upon the whole, I think they rendered no services calling for remuneration; but if they were entitled to some little consideration, they should have pressed their services before the local magistrates.

My only doubt is as to costs. The parties who entered this action clearly should pay their own; but the point is, whether they ought not to be condemned in the costs of the other parties. On a consideration, however, of the circumstances, that the salvors belonging to the eight boats will have the whole award—that the owners will receive a moiety of their property, which, from being left derelict, must be beyond their expectations—I shall, though doubtful of the propriety of the decree, leave each party to pay his own costs.

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[ \* 162 ]

\* CALYPSO, Phalp.

February 15, 1834.

**Bottomry.** 1. A commission on value of ship and cargo, for superintending repairs and the unlivery and reloading of the cargo, being an item in the account for the amount of which a bond had been given, objected to, and the balance tendered. Tender pronounced against, with costs; and the registrar and merchants being directed to report on the above commission, it was subsequently disallowed. 2. The court will not look closely into the various items covered by a bond, when necessity and the want of other means exist, and no fraud or collusion is suggested.

THIS ship, whilst on a voyage from St. Petersburg to London, sustained damage at sea and was obliged to put into Baltic Port, where part of the cargo was unladen, and she was repaired. The master, being in want of funds, applied to Messrs. Clayhills & Son, of Revel, and gave them a bottomry bond for the sum of 697*l.* 4*s.* 3*d.*, being at the rate of ten per cent. on the money advanced, and payable fourteen days after the ship's arrival at London. The validity of the bond was admitted, but the owners objected to an item of 281*l.* 4*s.* 8*d.*, or two per cent. commission on the value of the ship and cargo, and also to the charge of ten per cent. maritime interest on the last-mentioned sum, alleging the repairs to have been done under the direction of the master, and contending that two per cent. commission should have been charged only on the sum for which the bond was given, and not on the value of the ship and cargo; and that the

ten per cent. maritime interest should only have been charged on the money actually expended, and not on the amount of this two per cent. commission. The bondholders replied, that it was the universal and well known custom in the Baltic trade to charge this commission on the value of the ship and cargo; that the master had consented to it, and that if he had objected to this charge at the time, neither Messrs. Clayhills & Son nor any one else would have advanced the money.

On the 29th of November, 1833, an action was \*entered [ \* 163 ] in 1,000*l.* on behalf of the bondholders; and on the 30th of December the owners tendered 392*l.* 17*s.*, with such costs and interest as were due. This tender was not accepted. There was no proof of the alleged custom; no affidavit was on either side offered.

*King's Advocate* and *Nicholl* for the bondholders.

*Dodson* and *Addams* for the owners, cited *The Zodiac*,<sup>1</sup> and *The Cognac*.<sup>2</sup>

SIR J. NICHOLL. It is not denied that the money was properly borrowed, or that it was necessary to hypothecate the ship; the bond is due at least in part, but an objection is taken to a certain part of the charge which appears in the account furnished by the lenders. Where money is borrowed for necessary purposes during the course of a voyage, and where there was no other credit, the court is disposed to go far in upholding such bonds. Here the damage was done, the necessity for a bottomry loan ensued, and the existence of any other credit is not suggested. The giving such a bond is the act of the master — the agent of the owners; and it is not to be slightly vitiated. Nothing of fraud or collusion is here shown or suggested; and it does not appear that there existed any other means than a loan on bottomry, of continuing the voyage.

It is said that there is an item in the amount for which the bond was given which is illegal and extortionate; namely, two per cent. commission on the value of the ship and cargo. It is answered, that this is a usual charge in Baltic trade, which is denied on the \*part of the owners. It is singular enough that this account [ \* 164 ] is attested by the agent to Lloyds, and it is not to be supposed that he would have attested it unless it had been a regular account. Some persons, however, who are accustomed to settle aver-

<sup>1</sup> 1 Hagg. A. R. 320.

<sup>2</sup> 2 Ibid. 377.

ages, say, that such a charge would not not, on a reference, be allowed by them; but it is not necessary for the bondholders to show that this custom exists in all cases of bottomry. In this case not only is the money advanced, but it appears by the account that the lenders had the whole management and care of the ship and cargo during the time the repairs were in progress, and that some money was paid by them out of pocket. The court is not, therefore, prepared to say that this charge is extortionate. Suppose that instead of advancing the money on bottomry and taking the risk of the voyage, the Messrs. Clayhills had taken the master's bills on the owners; or suppose they had borrowed the money of different merchants, would they not have charged commission on the agency of the whole matter? The ten per cent. interest is for taking the risk of the voyage, not for the previous management and agency. The Master executed the bond for the whole amount; if he had not allowed this charge he would not have got the money, nor been able to get away at all, and unless the court is very much mistaken, it has seen, in the last war, a higher commission charged for much less trouble and superintendence by merchants of this city, who, so far from being extortionate, are the most liberal in the world. Moreover, this court is very reluctant to look narrowly into these charges; bottomry bonds are not to [\* 165] \* be invalidated unless some fraud or collision be proved, or unless it clearly appear that some other credit existed, or that the money was raised for some other purpose than necessary repairs and expenses. If the accounts were to be too rigidly investigated, voyages would often be defeated by ships being without credit in foreign parts.

The court accordingly pronounced against the tender, with costs; directed two per cent. commission to be allowed on all the money laid out, and that the registrar and merchants should report whether two per cent. commission should be allowed on the whole value of the ship and cargo; and it further directed maritime interest at ten per cent. to be paid on all the sum allowed.

The report stated "that the charge of two per cent. on the value of the ship and cargo could not be sustained, and that there was due on the bond 467*l.* 13*s.* 10*d.*, (according to a schedule,) of which amount a sum of 55*l.* was allowed as a remuneration for care and superintendence." The report did not state the principle on which it fixed this latter sum.

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The Effort. 3 Hagg.

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## EFFORT.

July 1, 1834.

Salvage. 1. In a case of complete derelict, one moiety of the value apportioned between various salvors according to their respective services. 2. The first occupants may prevent the interference of others.<sup>1</sup>

THIS was a case of derelict.

*King's Advocate* and *Addams*, for salvors.

*Dodson*, for the claim of *The Waterloo*.

*Phillimore* and *Haggard*, for the owners.

\* *SIR J. NICHOLL*. This is a case of complete derelict, and [ \* 166 ] of considerable merit in the principle salvors. The *Effort*, of 345 tons burden, became water-logged, and was abandoned by her master and crew on the 17th January, in lat. 50, long. 17, on a voyage from New Brunswick to North Shields, with a cargo of timber.

On the 12th of February, it was reported at Milford that she was floating in the Irish Channel at the mercy of the winds and waves. The agent of Lloyds at that port, requested to two branch pilots to go in search of her, not only for the benefit of the owners or underwriters, but also to remove a dangerous nuisance from the track of other vessels which might otherwise be in danger of running foul of her in the night time. Accordingly two branch pilots in the smack *Mary Ann*, of thirty-eight tons, with a crew of five men, went out on the 13th; but as it blew a gale of wind their efforts were fruitless, and they were obliged to return to Milford the same day. On the 14th the wind moderated, and several wind-bound vessels being enabled to proceed on their voyages, the pilots were obliged to conduct them out of port. On the 15th they again went out, and at about seven o'clock, A. M., discovered *The Effort* with only one mast standing; they with some risk and difficulty got a hawser on board her, took her in tow and steered for Milford; but the weather was unfavorable, the vessel large, and they made but little progress; about six P. M., a four-oared gig came on board the smack and gave her

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<sup>1</sup> [As to second sets of salvors, see *The Maria*, Edw. 175.]

crew some little assistance; between six and seven P. M., [ \* 167 ] The Waterloo, a smack of fifteen tons burden and \* three men, which had been sent in the morning to Milford for a cable and anchor, joined The Mary Anne, but though she pressed and obtruded her services, they were not accepted; her size, however, shows that she could not have been of much use in towing, and besides, The Mary Anne was in the possession of the derelict, and her crew had a right to refuse assistance if they thought themselves sufficient to effect the service.<sup>1</sup>

About seven P. M., the same evening, the revenue cutter, Cheerful, of 170 tons, going with despatches to Port Eino, a short distance to the eastward, was requested to assist, and it was agreed that one of the pilots should take charge of her whilst The Mary Anne carried her despatches; accordingly, on the 16th The Cheerful brought The Effort within the harbor of Milford; but the wind being light, she was towed up the haven by two row-boats. On the 17th she was brought into Hubberstone Pill; the next day she got higher up, and on the 19th was finally moored. This, therefore, is a manifest case of derelict; and by the old law half the value was always given in such cases; but it has been long held that the proportion is discretionary and dependent on circumstances; seldom, however, more than one half, or less than one third is given.<sup>2</sup> The value of the ship and cargo is 1,600*l.*; and I shall award a clear moiety, after deducting the costs and expenses. In apportioning the salvage, I think that The Mary Anne must be considered as the principal salvor; she was not only the first occupant, but undertook the enterprise and executed [ \* 168 ] it with labor and peril; if she could have completely \* effected it, she would have been entitled to the whole; for no other vessel, except from strong necessity, had a right to interpose in the business. Dividing therefore, the moiety into eight parts, I shall allot her four eighths, or half the salvage. The Cheerful, having been employed by and associated with the Mary Anne, is to receive three eighths; and the remaining one eighth must be divided between The Waterloo, the gig, and the row-boats. The master of The Waterloo receiving a triple share of this one eighth. If The Waterloo had not attempted to force and obtrude herself, I might have allowed her rather a larger portion.

<sup>1</sup> Eugene, *ante*, 156.

<sup>2</sup> Britannia, *ante*, 153. W. Hamilton, *post*, 168.

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The John Dunn. 3 Hagg.

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WILLIAM HAMILTON, Hughes.

July 1, 1834.

In derelict property of a very small value, (no owner appearing,) whole of net value, summarily, awarded.

THIS vessel had been found a derelict, the wreck had been sold by order of the customs, and the net proceeds, after deducting outport expenses, paid into the registry. There was no appearance for the owners. The court, on motion by Addams, waived the *primum decretum*, and awarded 35*l.*, the balance for all costs, to be paid to the salvors.<sup>1</sup>

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JOHN DUNN, Colville.

June 2, 1834.

On affirmance of salvage award, attachment for non-payment decreed.

THE owner of a collier appealed from an award of salvage made at Great Yarmouth. He did not give bail. The award was affirmed with costs; a monition against the owner for payment was granted; it was not obeyed; and in Mich. term, on motion by Nicholl, an attachment decreed.

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<sup>1</sup> Derelict, (unknown,) found (Nov. 21st.) off St. Agnes. Proceeds, 216*l.* 4*s.* 6*d.* decreed to eighty-two salvors, subject to law expenses on the part of the crown.

[ \*169 ]

\* GIROLAMO, Guiranovich.

November 21, 1834.

1. A foreign ship, though in charge of a licensed pilot, is liable for the full amount of damage arising from a collision for which she alone was to blame, notwithstanding the stats. 1 & 2 G. IV. c. 75, and 6 G. IV. c. 125, which do not extend to proceedings in this court.<sup>1</sup>
2. The municipal law extends to foreigners only in certain cases. 3. The Instance Court of Admiralty is guided by the principles of international, and not by those of the municipal law.

*Seemle*, that in cases of obvious danger the master is bound to interfere in the management of the vessel, although a licensed pilot be in charge of her.<sup>2</sup>

THE *Girolamo*, an Austrian vessel, left the London docks with a licensed pilot on board, towed by a steamer, on the 25th April, 1834. After she had passed Blackwall, a fog came on, during which she ran foul of *The Edward*, a British convict vessel, moored a little below Woolwich, in the proper berth for such vessels. The *Girolamo* was arrested and gave bail in 200*l*.

The owner of the *Girolamo* appeared under protest, on the ground that under the 6 Geo. IV. c. 125, and 1 & 2 Geo. IV. c. 75, s. 32, he was not liable for the damage.

*Addams* for the *Girolamo*.—A foreign vessel cannot be liable for damage done whilst a licensed pilot is on board; she is compelled to take such a pilot, for though there is no penalty for not taking one, no clearance can be obtained at the custom-house until the pilotage be paid. He relied on s. 55 of 6 Geo. IV. c. 125.<sup>3</sup>

SIR J. NICHOLL. If either a British or foreign vessel take a pilot when not required by law to do so, such pilot is the servant of the owner, who is responsible for his acts. The

<sup>1</sup> [But see *The Maria*, 1 W. Rob. 95.]

<sup>2</sup> [*The Lochlibo*, 3 W. Rob. 310; S. C. 1 Law & Eq. R. 653; *The Christina*, 3 W. Rob. 27.]

<sup>3</sup> "And be it further enacted, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof." Sect. 55.

remedy *in personam* against the owner and master is done away, but the remedy *in rem* remains, except that the 54th section limits the liability to the value of the ship and her freight. Against a foreign vessel, this court can still give the same remedy as if the act 6 Geo. IV. c. 125, had not been passed.

*Addams*. It might happen, that although a pilot were on board, the loss might be occasioned by the refusal of the master and crew to give charge of the vessel to him, or by their disobedience of his orders; and in those cases the owner would be liable to the extent of the value of the ship and freight; but otherwise the act gives no remedy except against the pilot. *Bennet v. Moita*, 7 Taunt. 258, and *Ritchie v. Bousfield*, *ibid.* 309, are cases which were decided upon 52 Geo. III. c. 39, s. 30, (a clause nearly corresponding with 6 Geo. IV. c. 125, s. 55,) and are precisely in point. Abbott on Shipping, p. 160, (last edition,) lays it down, that where owners or masters are compelled to place their ship in charge of a pilot, by act of parliament, under a penalty, they are not responsible for damages. Nothing can be so hard as to say to a foreigner, "You shall not manage your own vessel; we will compel you to take a particular agent on board and to pay him largely for his services, and if he occasion loss or damage, you shall not only bear your own, but also make good that which has been caused by his neglect or incapacity." In *The Neptune the Second*, 1 Dods. 467, Lord Stowell never referred to the 52 Geo. III. c. 39; he held that the "mere fact of having a pilot on board and obeying his directions would not discharge the owners;" but \* in this we contend that the pilot [ \* 171 ] was not "merely" on board; we were compelled to take him and pay pilotage.

The *King's Advocate*,<sup>1</sup> for the Edward.—Liability by the general law, is not to be taken away by implication. The case of *The Neptune the Second* is in point; it shows clearly what the old law was. The only doubt, before the 6 Geo. IV. c. 125, passed, was as to the personal liability of the master or owner; there was no doubt as to the liability of the vessel: this liability is not taken away by the statute; and the jurisdiction of this court is expressly retained by s. 87 of that act.<sup>2</sup> *Bennet v. Moita* was an action brought in a court

<sup>1</sup> On the first session of Michaelmas term, Sir John Dodson took his seat as King's Advocate; and Dr. Phillimore as Advocate of the Admiralty.

<sup>2</sup> "Provided always, and be it further enacted, that nothing herein contained shall extend to affect or impede the jurisdiction of the Court of Loadmanage, as far as



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of common law, which had no jurisdiction *in rem* like this court. It only decided that the master was not there responsible, which is quite consistent with the responsibility of the ship in this court. Similar observations apply to the case of *Ritchie v. Bousfield*.

*Addams*, in reply. — It is suggested, 1st, that the statute does not apply to foreign ships; 2dly, that it does not take away the remedy as against the ship. Lord Stowell, in the case of *The Carl Johan*, said, that the 53 Geo. III. c. 159, was not applicable to foreign ships [ \*172 ] or foreign owners. In substance \* and effect, there can be no remedy against foreign owners; no writ could go against such persons. The act says, "that no owner shall be liable;" this is attempted to be got rid of by saying, "but the ship is;" if so, the act is nugatory. A foreign owner could not be attached, and even before the act was passed, a British owner was only liable to the extent of the value of the ship and freight.

SIR J. NICHOLL. This is a case of considerable importance to the mercantile interests of the community, and on that account it has received a full consideration from the court.

The grounds of protest are, "That the action is brought to recover the amount of damage sustained by *The Edward*, by the collision at the time that the pilot was on board and had charge of *The Girolamo*: that referring to the acts 6 Geo. IV. c. 125, and 1 & 2 Geo. IV. c. 75, s. 32, *The Girolamo* is not liable."

This is answered on the part of *The Edward*: "That *The Girolamo* is a foreign vessel, her owner being an Austrian subject; that under 1 & 2 Geo. IV. c. 75, the owner is answerable in this court; that foreign ships are not compellable to take a pilot; that the penalties of 6 Geo. IV. c. 125, cannot be enforced against foreign owners and masters; that at the time of the collision *The Girolamo* was going down the river at a rapid rate, towed by a steamer, and ran on board *The Edward*, lying at her moorings in the berth appointed for convict ships; that the morning was very foggy, and that *The Girolamo* ought not to have been got under weigh."

[ \*173 ] \* The reply for *The Girolamo* exhibits the receipt for the pilotage, which the master was obliged to pay before he could be cleared out at the custom-house — and states "that she was not going at a rapid rate; that the steamer was engaged by the pilot,

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respects the pilots appointed under the authority of the said court; and provided, also, that nothing in this act contained shall extend or be construed to extend to affect or, impair the jurisdiction of the High Court of Admiralty."

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and was of only 20-horse power; that when she left the docks the weather was clear; that the fog did not come on until below Blackwall; that, from the state of the tide and her draft of water, it was impossible to bring her up." And again, it is replied, on behalf of *The Edward*, "that it is customary in foggy weather to bring up; that this was not impossible either at Bugsby Hole, or off the Arsenal at Woolwich, which is from a quarter to half a mile above the place where the collision occurred."

This protest does not deny the jurisdiction of the court, nor the regularity of the proceedings: the statement, if any thing, is matter of defence; and to preserve the regularity of the proceedings, the protest must therefore be overruled: but as it may be convenient to the parties to arrive at the opinion of the court upon the whole case, and as the property in contest is of small amount, it seems desirable to enter on the consideration of the several points which the case presents.

The facts do not raise any doubtful question respecting the usage of the sea, skill, or seamanship, or as to which of the two vessels (if either) was deficient in caution, for one was lying motionless at her moorings, and the other was in motion and governable. Without question, the vessel in motion is bound, if possible, to steer clear of and avoid the vessel at her moorings, and nothing can in such a case excuse her from making \*compensation but un- [ \* 174 ] avoidable accident; nothing but that *vis major* which no human skill or precaution could have guarded against or prevented.

What, then, are the facts admitted by the defendant? Here is a vessel in a thick fog, dropping down the river at the rate of from three to four miles an hour, which runs against another lying at her moorings in her proper berth. The fog was so thick, that though, as asserted, *The Girolamo* immediately dropped anchor, she did not perceive the other vessel until too near to avoid her, and whether the steam-tug had slacked the towline or not, she was going so fast as not to see and avoid an object so large as another vessel of 400 tons burden; — could no precaution have prevented this? It seems to be admitted that if the fog had come on before *The Girolamo* left the docks, she ought not to have commenced going down the river; but it came on soon after passing Blackwall — that is, some miles above the place of collision; — it was then her duty, when the fog came on, to have brought up; and there were places where, notwithstanding her draught of water, she might have brought up; this is satisfactorily proved. Having a steamer, they had complete command of the vessel, for immediately after the collision she is carried back to Blackwall, and arrives there at noon. The steamer had ceased to tow her,

and she was without even a boat ahead on the look-out in order to guard against collision, without the tow-line taught enough to give her a different direction; drifting down at the rate of three or four miles an hour in a thick fog, without motion enough through the water to obey her helm. The master expressly says, "that [ \*175 ] he did \*not in the least interfere;" there is no doubt, therefore, that under such circumstances, a vessel would be *prima facie* liable for any damage done by her.

But it is set up by way of defence, that neither the vessel, owners, nor master, but only the pilot, is answerable under the 6 Geo. IV. c. 125. Several points arise out of this ground of defence.

First, was the damage done by the sole default of the pilot, and was the master in no degree culpable?

Secondly, can this defence be set up in a proceeding *in rem* in the Court of Admiralty?

Thirdly, can it be set up by a foreign ship?

In the first place, it is by no means clear that a foreign ship is compellable to take a pilot, for there are no means of compelling a foreign vessel outward bound, and having actually commenced her voyage, to do so. A foreign vessel may indeed be compelled to pay the pilotage, whether she has a pilot on board or not, by the second section; and that clause and some others strongly infer that a pilot ought to be taken on board, not only for the purpose of protecting the foreign vessel herself, but others which may be in her way — British vessels and British property within our own harbors; but if the master should neglect to take a pilot, there are no means of enforcing the penalties against him. If, then, the taking a pilot on board be considered as the voluntary act of the foreign master, the pilot is in such case the servant of the foreign master and owner, and they must seek their indemnity from him; but it may not be necessary for the court now to decide this point.

[ \*176 ] \* But again, did the accident arise from the "neglect, default, incompetency, or incapacity" of the pilot? or was the master *in pari delicto*? It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted that, if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blamable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other persons whose property might be damaged by a collision, to insist on bringing the vessel up? If he was in as much haste to get out of port as the pilot was to finish his job, are they not *in pari delicto*? Was \*

not the master in duty bound, at least, to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit, "he did not in the least interfere." In this aspect the case is, as far as I am aware, new, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of.

The Pilot Act provides that owners or masters of vessels conducted by pilots shall not be responsible for any damage done by reason of the "neglect, default, incompetency, or incapacity" of such pilot; but must not this be strictly confined to the act of piloting? Is the master or are the owners relieved from all sorts of responsibility, however gross and manifest the misconduct of the pilot may be, whilst the master remains a passive looker-on, without taking any step to guard against damage? Supposing, however, this to be the rule \* established by the statutes, so far as respects the municipal law, and which is to be applied in the municipal courts, in any personal action against the master or owners, is that the rule to be applied in this court, where the proceeding is not against the master and owners, but *in rem*, against the ship, and where the law maritime, according to the law of nations is to be administered? It cannot be doubted that before these statutes passed, exonerating masters and owners when a licensed pilot is in charge of the vessel, that remedy existed in this court, and the legislature has not in express terms taken it away. It is a question turning upon the construction of an act of parliament; whether, when the municipal law says nothing of a proceeding *in rem*, and expressly reserves the jurisdiction of the Court of Admiralty, the remedy which existed in that court by the old law is taken away? It may, therefore, be necessary to trace briefly the several statutes that have passed on this subject, as well as the decisions on their construction.

It is hardly necessary to notice the 26 Geo. III. c. 86, which is entitled "An Act to amend and explain" the 7 Geo. II. c. 15, relating to the liability of owners; that act confined their responsibility to the value of the ship and freight, but it seems to apply only to damage happening to goods laden on board. The next act to be referred to is the 52 Geo. III. c. 39, "for the more effectual regulation of pilots and the pilotage of vessels on the coast of England;" this repealed the 48 Geo. III. c. 104, passed "for the better regulation of pilots and of the pilotage of ships and vessels navigating the British seas," so far as the same related to pilots. It also (s. 27) [\* 178 ] exonerates owners from responsibility for "any damage" done beyond the value of ship and freight, thereby going beyond the 26 Geo. III. c. 86, which confined it to goods on board; but the 30th

section expressly enacts, "that no owner or master of any ship or vessel shall be answerable for any loss or damage from, or by reason or means of any neglect, default, incompetency, or incapacity of any pilot taken on board of any such ship or vessel, under or in pursuance of any of the provisions of this act." There is a distinction, but not a very material one, between these words and those of the 6 Geo. III. c. 125; the one says, "any pilot taken on board;" the other, "any licensed pilot acting in the charge of any such ship or vessel." Section 31 of 52 Geo. III. enacts, "that nothing in this act contained shall be construed to extend to deprive any persons of any remedy, by civil action against pilots or other persons, which they might have had if this act had not passed;" and by the 73d section it is "not to affect or impair the jurisdiction of the High Court of Admiralty." The court is not aware of any earlier act than this act of the 52 Geo. III. exonerating owners or masters because a pilot was on board the vessel; such a provision was first introduced into this "Pilot Act," as it is commonly called. In the following year, the 53 Geo. III. c. 159, "An Act to limit the responsibility of ship-owners in certain cases," passed; it recites the 26 Geo. III. c. 86, and enacts that "owners shall not be liable to answer for or make good any loss or damage happening without their fault or privity, to any [\* 179] goods on board, or which \* may happen to any other ship or vessel, or to any goods on board of any other ship or vessel, further than the value of their own ship and freight." The 55 Geo. III. c. 87, is not material; but before I proceed to consider the act now in force, (6 Geo. IV.) I may just mention the 1 & 2 Geo. IV. c. 75, s. 32, which is referred to in the act on petition, but which does not apply as a matter of defence; it merely affords means of obtaining bail from a foreign vessel doing damage in any harbor, river, or creek, places which in some respects are out of the jurisdiction of the Court of Admiralty. In these cases, it being vain to bring any action against a foreign master or owners, (who might be out of the jurisdiction,) the legislature gave the municipal courts something of a proceeding *in rem*, so far, at least, as to detain the ship in order to get bail; but they have no power of proceeding to sale, or of applying the proceeds in discharge of the damage; and lest any doubt should arise as to the admiralty jurisdiction in "any harbor, river, or creek," as being *infra corpus comitatus*, included the judge of the admiralty in this power of arrest. In the present case, however, there can be no doubt of the admiralty jurisdiction over a foreign vessel which has begun her voyage, and was within the flux and reflux of the sea at the time of the collision, without the aid of this act.

I now, therefore, proceed to consider the 6 Geo. IV. c. 125, under

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which the defence is sought to be maintained, and upon the true construction of which this case depends. The material sections are sections 53, 54, 55, 56, 57, and 87. The 53d section enacts, that "no owner or master of any \* ship or vessel shall be answer- [ \* 180 ] able for any loss or damage which shall happen to any person or persons whatsoever, from or by reason or means of no licensed pilot being on board," unless this arise from the refusal or neglect of the master. If no licensed pilot can be obtained, the master and the crew must necessarily navigate the vessel; and if, by any want of skill, they shall occasion damage to another vessel, is it meant to be contended that the act has wholly exonerated the master? It would be a strange construction of the act to hold that, if no pilot be on board, and this owing to no fault on the part of the master, and the vessel then does any damage, neither master, nor owner, nor vessel are to be held answerable for that damage, though arising from the negligence or want of skill of those on board; yet such would be the effect of these words, taken in the strictest sense. All these clauses, however, must be taken together; they are only repetitions of former statutes, and they lead to another interpretation; the 54th and 55th sections, for instance, enact that owners shall under no circumstances be liable beyond the value of the ship and freight, and that neither owner nor master shall be liable if a licensed pilot be on board and in charge; but this only exempts them from personal responsibility; these are municipal laws for the regulation of the municipal courts in their personal actions against owners or masters, but they do not apply to the Court of Admiralty.

The next clause, indeed, enacts that nothing in the act is to deprive persons "of any remedy or remedies upon any contract of insurance, or of any other remedy whatsoever, which they might have \* had if this act had not been passed, by reason or on ac- [ \* 181 ] count of the neglect, default, incompetency, or incapacity of any pilot duly acting in charge of any ship;" and then comes s. 87, expressly saving the jurisdiction of the Court of Admiralty. If, then, all the former remedies are to remain, and if the jurisdiction of the Court of Admiralty is to be unimpaired, the remedy against the ship still exists, and masters and owners are only exonerated from personal responsibility. Unquestionably the legislature might regulate the jurisdiction of the Court of Admiralty; but, if this had been intended, it would have been done by express words; this is not done; on the contrary, here is an express reservation of "any other remedy whatsoever," and a further express reservation of the jurisdiction of the Court of Admiralty. Before any of these acts passed, there can be no doubt that a pilot being on board would not have exempted the

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owner from responsibility ; what then is meant by "any other remedy or remedies whatsoever?" Can it mean only the remedy against the pilot to the amount of his bond, namely, 100*l.*, in case of a vessel and cargo doing or sustaining damage to the amount of 10,000*l.* through his default? The remedy reserved, and the jurisdiction reserved, appear to me to mean, by the most just and fair construction, the remedy *in rem*, in this court, according to the existing rule of the maritime law of nations.

It may, however, be proper to see what constructions have already been put on these acts. We have already noticed that the [\*182] 52 Geo. III. c. \*39, has the same clause, exonerating the master and owners when the vessel is in charge of a licensed pilot; and reserving all other remedies and the jurisdiction of this court as the 6 Geo. IV. The former act received the royal assent on the 20th April, 1812, and in the following year the 53 Geo. III. passed, which exonerated owners in all cases from responsibility for any damage beyond the value of the ship and freight. The case of *The Neptune the Second*<sup>1</sup> was decided in November, 1814; the collision having been in January, 1814 — somewhat less than two years after the passing of the 52 Geo. III. It cannot, therefore, be supposed that this act could have escaped the recollection of the learned judge who decided the case, and who was himself a member of the legislature, and what was his decision? "It is acknowledged," he says, "that the damage was done by the ship proceeded against; but it has been set up, in the way of excuse, that she was, at the time, under the care of a regular pilot, and was acting in obedience to his directions; and it has been contended in the argument, that the pilot alone is liable for the damage that may have been sustained in consequence of the mismanagement of the vessel. If the opinion could be maintained that the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they would stand excused in the present case, for I think it is sufficiently established in proof that the master acted throughout in [\*183] conformity to the directions of the pilot; but \*this, I conceive, is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had, for compensation. The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount, as well as they can,

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<sup>1</sup> 1 Doda. 467.

against him. It cannot be maintained that the circumstances of having a pilot on board, and acting in conformity to his directions, can operate as a discharge of the responsibility of the owners."

This, then, is the decision of Lord Stowell on the construction of this act, about two years after it had passed, that the owners are not exonerated, but that there is a remedy in this court against the ship.

This case seems a direct decision upon the construction of the act; for although it is not specifically mentioned, I cannot suppose that it escaped the notice, not only of the judge, but of the counsel, of the proctors, of the parties, possibly of the insurers, and of the pilot who made an affidavit in the cause. It is, however, possible, that *The Neptune the Second*, being a foreign ship, this municipal act might not have been considered by that great judge as applying to the case. This is a point to be presently considered, the vessel now in question being also a foreign ship. There are two cases which were decided, the one in 1815, the other in 1816, at common law, under the *Liverpool Pilot Act*,<sup>1</sup> but which do not seem to bear materially upon the present \*question, *Carruthers v. Sidebottom*,<sup>2</sup> and [ \* 184 ] *the Attorney-General v. Case*.<sup>3</sup> In the first case, the assured recovered against the underwriters, though the damage was the result of the conduct of a local pilot; in the second, the British owners were held not to be protected either by the *Liverpool Act* or by the 52 Geo. III.; but the cases are said, in *Abbott on Shipping*, p. 160, not to be easily reconcilable with each other. There are, however, two other cases, which it is contended are in point, *Bennet v. Moita*,<sup>4</sup> and *Ritchie v. Bowsfield*.<sup>5</sup> In both these cases, which were personal actions against masters, brought in the municipal courts, it was held that a pilot being on board and in charge was a good defence, and exonerated the defendants. The statute is distinct and express on the subject, nor could the judges have decided otherwise under it. But these decisions are not inconsistent with that of Lord Stowell's in *The Neptune the Second*. The judges did not decide that there existed no remedy against the ship in another court. In *Bennet v. Moita* the defendant was a foreigner, but no point was raised upon that ground, and by these cases nothing is decided but that the personal liability of masters and owners, in actions at common law, is limited by those acts.

There is, however, another ingredient of some importance in this

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<sup>1</sup> 37 Geo. III. c. 78; not in the collection of statutes.

<sup>2</sup> 4 M. and S. 77.

<sup>4</sup> 7 Taunt. 258.

<sup>3</sup> 3 Price, 303.

<sup>5</sup> Ibid. 309.



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case; this defence is set up by a foreign owner, in behalf of a foreign ship, in a court governed by the principles of international [ \* 185 ] law; and a question arises whether a foreigner \* can, in a suit in this court, set up as a defence a municipal law made to regulate municipal courts only, and contrary to those general rules of law which prevail amongst commercial nations. Reciprocity, or mutuality, has always been considered as one of the leading principles of justice in questions arising between nation and nation. For example, by our municipal law this country established the principle of restitution upon payment of salvage in cases of the recapture of British property from the enemy, notwithstanding *pernoctatio infrà præsidia*, or any of those old general rules by which the property of the former owners was held to be extinguished; but the application of this rule to the property even of our allies in the late war was held to depend entirely upon its reciprocity. Thus in the case of *The St. Jago*, (cited in *The Santa Cruz*. 1 Rob. 63,) the property was condemned as prize to the recaptors, on the ground of its not being shown that restitution of the property of an ally, upon payment of salvage, was the rule of Spanish law; and in the case of *The Santa Cruz* itself, the same principle was applied with respect to Portugal; but upon that country afterwards engaging prospectively to restore, upon payment of salvage, British property recaptured by Portuguese subjects, the rule was made mutual. But does this principle of reciprocity apply to cases of collision?

The true principles of international law have been laid down by some of our best text writers, as in 1 Bla. Com. c. 7, p. 273, (also 4 Bla. Com. c. 5, p. 67,) where it is expressly laid down, that, "affairs of commerce are regulated by a law of their own, called the [ \* 186 ] law merchant, or *lex \* mercatoria*, which all nations agree in and take notice of." Before the enactment of the municipal law by 52 Geo. III., and 6 Geo. IV., the general rule of international law, by which this court was governed in cases of collision, was that a vessel doing damage to another was liable to make full compensation. This rule was recognized by Lord Stowell in the case of *The Nostra Signora de los Dolores*,<sup>1</sup> where he decided that foreigners, when suing British subjects, were not bound by the municipal law, and said, "I do not recognize the applicability of those cases which have been determined between British subjects to such a case as this, — which is founded on the law of nations — is brought on the complaint of a person not subject to our laws, and is to be tried in a court whose duty it is to administer the law of nations."

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<sup>1</sup> 1 Dods. 290.

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The *Girolamo*. 3 Hagg.

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Again, in the case of *The Carl Johan*, I conceive that this principle was directly applied, and the construction of the 52 Geo. III. fully considered by the same great authority. There has been as yet no full printed report of this case although it is referred to in *The Dundee*;<sup>1</sup> but I am in possession of a very full MS. report of it from the notes of Dr. Arnold, and I have no doubt of its correctness. The facts were these: *The Carl Johan*, a Swedish vessel, ran down the British ship, *James*, (which was totally lost,) off the coast of Norfolk. *The Carl Johan* was arrested and bail given in 1,500*l*. The case was heard in November, 1819, when Trinity Masters attended, and it was decided that *The Carl Johan* was the cause of the collision; she was condemned \*in the damage, and the amount refer- [\* 187] red to the registrar and merchants. From this sentence an appeal was entered, but afterwards abandoned; and the cause was remitted; — the registrar then reported the amount of the damage to be upwards of 1,000*l*. The proctor for *The Carl Johan*, by petition, objected to the registrar's report, on the ground that the amount of the damage, as reported, exceeded the value of the ship and freight, whereas by the 53 Geo. III. c. 159, s. 1, (as in the 6 Geo. IV.,) the owner was only responsible to that extent, and upon this question Lord Stowell gave judgment in November, 1821. He held "that the new rule introduced by the 52 Geo. III. was one of domestic policy, and that with reference to foreign vessels, it only applied in cases where the advantages and disadvantages of such a rule were common to them and to British vessels; that if all states adopted the same rule, there would be no difficulty, but that no such general mutuality was alleged; that if the law of Sweden adopted such a rule, it would apply to both countries, but that Sweden could not claim the protection of that statute without affording a similar protection to British subjects in similar cases;" and he therefore dismissed the petition on behalf of *The Carl Johan*, and finally condemned her owners to make good the damage to the amount reported by the registrar and merchants. This judgment appears to be a direct authority that these acts, however binding in the municipal courts, nay, possibly even in this court, as between subject and subject, yet cannot be set up by a foreign ship in this jurisdiction.

If, indeed, it had appeared that a British vessel \*sailing [\* 188] out of Trieste with a pilot on board, and doing damage to an Austrian vessel, would not be liable to make good the loss because such British ship had a pilot on board, it might have varied the case,

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<sup>1</sup> 1 Hagg. A. R. 113.

more especially if there were any treaty or convention, or any practice inferring that such rule should be mutually observed; but there is no such suggestion; and therefore the general rule of law "that owners are responsible," must be considered as the existing principle in this case.

Again, in the case of *The Dundee*,<sup>1</sup> although this particular question was not decided, yet the case of *The Carl Johan* was referred to in the argument, and the general principle that owners are responsible seems to have been recognized on both sides. There is, however, a more recent case to which the court is bound to refer; that of *The Christiana, Larsen*.<sup>2</sup> The marginal note is, "Under stat. 1 & 2 Geo. IV. c. 75, the Court of Admiralty is authorized not only to arrest a foreign ship, but to proceed to judgment in a case of collision; but a duly qualified pilot being intrusted with the navigation of the vessel, the owner is exonerated under 6 Geo. IV. c. 125, sec. 55, which applies equally to foreign as to British ships." That may be considered as the general effect of the decision; but the question, with respect to foreign ships, does not seem to have been either very fully stated or much considered; for the learned judge<sup>3</sup> said, "I should not have been surprised to have found a distinction as to foreign ships [ \* 189 ] existing on general principles, though I do \* not know of any formal authority to that effect." I cannot help thinking that the learned judge was hardly aware of the extent of the case of *The Carl Johan*; and *The Neptune the Second* may not, in the argument in *The Christiana*, have been adverted to. The learned judge further observed, that "the Court of Admiralty had always treated this statute as obligatory on foreign ships as well as on our own;" but he did not refer to any cases to this effect. The case of *The Christiana* does not, therefore, seem to me sufficient to countervail the other authorities to which I have referred.

Foreign vessels and foreign persons are indeed liable to the municipal laws for acts done within the local jurisdiction of municipal courts; they may be liable to pilot and custom-house dues; may not be allowed to clear out without paying such dues; but it does not follow, that having commenced a voyage, and doing damage, they are entitled to make the same defence that British subjects might make *inter se*. If the owners of *The Edward* had merely got a judge's order to detain the ship until bail was given, and brought an action at law against the foreign master, the statute would probably have

<sup>1</sup> 1 Hagg. A. R. 109; 2 *ibid*. 137.

<sup>3</sup> Sir Christopher Robinson.

<sup>2</sup> 2 Hagg. A. R. 183.

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The Gondolier. 3 Hagg.

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been a good defence to such a proceeding, but it is a defence which cannot be set up in a court proceeding *in rem*, and governed by the rules of international law.

Upon the whole, I feel bound by the general principles of law, and the authority of Lord Stowell, to hold that this foreign ship is liable to make good the damage which The Edward has sustained, and if that damage was occasioned by the fault of the pilot, the owners' still have their remedy over against him. This remedy against the ship \* would have belonged here to the party sustaining [ \* 190 ] the damage if these acts had not passed, and such remedy, as well as the jurisdiction of the court, is reserved by the acts themselves, according to their true construction; I therefore overrule the protest, pronounce for the damage, and refer the amount to the registrar and merchants for their report.

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### GONDOLIER, Rhodes.

January 30, 1835.

**Wages.** A seaman who enters as second mate, and at a foreign port becomes first mate, held entitled, while the first mate, to a similar rate of wages as his predecessor, there being no new agreement. A trivial irregularity will not incur a forfeiture of wages.

**SIR J. NICHOLL.** This is a suit by J. Noble for wages on a voyage from Liverpool to Buenos Ayres and back. The vessel sailed in December, 1833; at Monte Video several of the crew left and some fresh hands were hired; and among them, on the 23d April, 1834, Noble was hired as second mate at 2*l.* 15*s.* per month; he continued with her till her return to this country and his discharge on the 27th of September, rather more than five months, which, at the original wages would be 13*l.* 15*s.*; but as he admits having received 5*l.* 13*s.*, a balance of 8*l.* 2*s.* remains. On the other hand a tender of 5*l.* 12*s.* has been made; this he has refused; and the court pronounces against the tender, there being no proof of its sufficiency even at the original wages.

But for the greater part of the time, namely, from the 26th of May, he claims wages as first mate, at 6*l.* per month. It appears that the last entry in the log, by Walton, the original first mate, is on the 22d May; from that day to the 8th June the \* entries [ \* 191 ] are in the master's handwriting; on the 9th they are in

Noble's handwriting ; and on the 13th is this entry : " Walton, mate, deserted the ship ;" and probably, from other entries as to refusal to work, and his absence from the ship, he had ceased to do duty much earlier, and that this duty had devolved on Noble.<sup>1</sup> From the 13th of June, however, till the ship's arrival at Liverpool, Noble kept the log, and did all the duty of first mate ; and he is entitled to increased wages for his services in that capacity. He did his duty properly, one single instance excepted. This occurred while the ship was in harbor, taking and stowing away cargo. The master, it appears, was a good deal on shore at the latter end of June, and beginning of July ; and on Friday, the 4th, he took on shore the key of the grog, but left open his own locker of wine ; and on Saturday morning, having no grog, Noble invited three or four to go into the master's cabin, and they there between them drank three bottles of wine ; Noble himself got rather fresh, but he went to work again, and when the master came on board, he and the other men were hard at work in the hold. This is the only act of irregularity imputed to him ; it probably was discussed at the time, and having got him a rowing, was forgiven, and as it seems, forgotten ; he did his duty as mate during the rest of the voyage. Such an irregularity is too trivial to incur a forfeiture of wages. It comes then to the question, what should be the increased wages ?

There is no fresh contract proved on either side ; wages were [ \* 192 ] probably high at Buenos Ayres, for a first mate, but I am not satisfied that they were as high as 6*l.* ; I will take them at 4*l.* per month, (which was the rate of payment to the former chief mate,) and allow four months at that rate.

I may observe, in regard to this case, that the master is part, if not principal, owner ; and he does not appear to have acted with the liberal and fair treatment to which this valuable class of men are entitled, and which belongs, I hope, generally to the merchants and ship-owners of this country. His tender of 5*l.* 12*s.* was very insufficient, and has had the effect of detaining this man, living at a boarding-house, and thus getting into debt. I pronounce for 13*l.* 8*s.* 11*d.*, as due for wages, and full costs.<sup>2</sup>

<sup>1</sup> See s. 41, *et seq.* of the 5 & 6 W. IV. c. 19., (to amend the laws relating to merchant seamen,) as to regulations upon the discharge of seamen abroad.

<sup>2</sup> See *The Providence*, 1 Hagg. A. R. 391.

## ANGLO-SICILIAN CAPTURES.

January 30, 1835.

Proceeds of capture by a conjoint British and Sicilian force, not disreputable as prize, without a sentence of condemnation. Claim on behalf of the Sicilian force, exclusively rejected.

DURING the late war the British troops were in possession of Sicily and in concert with the forces of the king of the Two Sicilies, various captures were made by the Anglo-Sicilian flotilla, property realized, and the proportion belonging to the British forces distributed; and in pursuance of a decree of this court, Count Ludolf (the ambassador of his Majesty the king of the two Sicilies) had also received a considerable sum of money arising from such captures; the present application was for payment to him of 833*l.* 7*s.*, which the Lords of the Treasury had directed to be paid into the registry, on its transmission to this country from \* Corfu, on the representation [ \* 193 ] of Count Ludolf, who claimed it on behalf the Sicilian forces, as proceeds of prize property.

Phillimore, in support of the motion, referred to an affidavit of Lieutenant Flinn, (who had, between 1811 and 1815, commanded a division of Sicilian gun-boats,) and to other documents, to show that the whole 833*l.* 7*s.* belonged to the Sicilians; and also to the 47 Geo. III. c. 47; 48 Geo. III. c. 100, and 4 Geo. IV. c. 65, extending to two previous acts to all cases of capture that might have been made by foreign ships or land forces in conjunction with his Majesty's ships or land forces.

SIR J. NICHOLL. This application is to direct the payment of the whole of this sum to the Sicilian minister, as the entire property of subjects of the king of the two Sicilies; there is no proof that the property has been adjudged to be prize; and to overlook such an irregularity might form a dangerous precedent; but if it had been adjudged prize, this court would not be in a condition to do more than order a proportion to be paid out to the Sicilian minister; for there is no proof that the whole belongs to the Sicilian people; there is, it is true, a list of Sicilian names given, but it does not appear that all the officers and men were in Sicilian pay; and it is stated that they were subsidized by the British government; the flotilla certainly was commanded by a British officer. I must reject the motion.

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The Ocean. 3 Hagg.

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*Phillimore.* Will the court proceed upon an order in council ?

[ \* 194 ] \* SIR J. NICHOLL. An order in council has been considered necessary in other cases of this kind ; but before I can direct the payment of this money as prize, there must be a sentence of condemnation.

Motion rejected.<sup>1</sup>

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OCEAN, Wabourne.

January 30, 1835.

Salvage. Upon an appeal by salvors, (the owner claiming,) two fifths, after deducting certain charges, of the value of an anchor with chain-cable, buoy and buoy-rope, decreed.

In January, 1834, an anchor and seventy-two fathoms of chain-cable with buoy and buoy-rope, of the value of about 20*l.*, were fallen in with off the coast of Norfolk by eight mariners of Wells, who had gone out in a boat in search of anchors ; they were carried to Blakey, and there delivered into the custody of the deputy vice-admiral's agent. The owner of the property and the salvors not agreeing upon the salvage, that question was, in virtue of 1 and 2 Geo. IV. c. 75, s. 7, referred to three magistrates of the district, and they awarded 4*l.* 10*s.* for salvage, and 2*l.* 15*s.* for expenses ; being composed of 2*l.* 2*s.* for fees payable to the deputy vice-admiral or his agent, under s. 14, of the Salvage Act, for reporting the property, and the rest for warehouse rent and valuation. From this award the salvors appealed ; and it appeared from Mr. Wheatley, the deputy vice-admiral of Norfolk, that it had been usual on the Norfolk coast, for the last six years, to settle salvage on anchors and chains with or without buoys, by giving two fifths of the value, deducting [ \* 195 ] the fees for reporting, valuing, and warehouse \* rent ; and that the same usage prevailed in the Cinque Ports. The appeal was stated to be brought in order to obtain a decision that might serve as a guide in similar cases.

*Addams*, for the award.

*King's Advocate*, *contrâ.*

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<sup>1</sup> See *The Marianna. Infra*, 206.

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The Lady Durham. 3 Hagg.

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SIR J. NICHOLL. The 1 and 2 Geo. IV. c. 75, s. 3, after enacting that the deputy vice-admiral, or his agent, may seize goods not reported and deposited, enacts, that "every deputy vice-admiral or his agent, who shall make any such seizure without any previous information being given to such deputy vice-admiral or his agent, shall, on the same articles being claimed by, and delivered to the owner thereof, or his or her agents, be entitled to receive such sum of money as shall be equal to one third part of the value thereof, after the payment of the duties and any charges incidental to the recovery and preservation of the same."<sup>1</sup> This clause of the act of parliament plainly points out what is due to the deputy vice-admiral or his agent in the case there provided for; and I think that these salvors ought certainly to have more than the public officer; two fifths is not here too much; the old allotment in derelict was a moiety. I decree two fifths, after deducting the incidental charges; and, as this appeal is said to have been brought as a leading case, to govern the magistrates of Wells, I shall leave each party to pay his own costs.

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\* LADY DURHAM, Stuart.

[ \* 196 ]

March 18, 1835.

A ship, designed on a trading voyage from Liverpool to Africa and back, sailed with goods for barter, and on her voyage home was, with her cargo, totally destroyed; the ship and cargo were the property of the same owner, and were insured,<sup>2</sup> held, in an action for wages against the owner, that in conformity with the general rule of law — that freight is the mother of wages — the summary petition was inadmissible.

A mariner has no lien for wages on the cargo, as cargo; his lien is upon the ship and freight. Whether if any cargo were saved it could be held to represent the freight, *quære*.

A mariner may be entitled to wages even if no freight be earned, [if the voyage be performed.]<sup>3</sup>

WAGES. The summary petition alleged, that in July, 1833, the said ship being in the port of Liverpool, within the jurisdiction, &c., and designed on a trading voyage from thence to the coast of Africa

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<sup>1</sup> Section 5th enacts, that if the deputy vice-admiral, or his agent, seize by previous information, he and informer to divide two sixth parts.

<sup>2</sup> [The salvor has no benefit from the owners' insurance, *Percival v. Hickey*, 18 Johns. 257; *Hurd v. Gould*, 11 Johns. 279; *The Penelope*, 2 Pet. Ad. R. 276.]

<sup>3</sup> [*Pitman v. Hooper*, 3 Sumner, 286.]



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The Lady Durham. 3 Hagg.

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and back to Liverpool, the master shipped and hired W. Jones to serve as a seaman on board, during her then intended voyage, and agreed to pay him wages for his services at the rate of 2*l.* 5*s.* per month; that Jones, on the 26th July, went on board and entered into the service of the ship in the capacity and at the wages aforesaid, and signed the usual ship's articles or mariner's contract for the performance of the said voyage; that a general cargo suitable to the African trade of barter having been taken on board, the ship on 26th July sailed from Liverpool with the same, (the usual insurance having been first effected on ship and cargo,) and with Jones on board; and safely arrived off the coast of Africa in September, and there commenced trading with the natives; that such trading with the natives up the different rivers and on the coast of Africa was still continued up to September, 1834, when the master, being at such time in the river Cameroone, wrote home to the owner, (Charles Horsfall, Esq.,) that he had nearly bartered the whole of his outward cargo, and was about to proceed to the island of Corusco to dispose in like manner of the residue, with the requisite information to enable the said owner to effect proper insurances on the homeward cargo, which insurances, pursuant to the information contained in the said letter, duly received by the said owner, were effected accordingly; that the said ship shortly afterwards sailed for the said island, and continued trading there until the 28th of October, when the last of her outward cargo being disposed of and the residue of her homeward cargo received on board, she sailed on her return voyage, her homeward cargo consisting of ivory, palm oil, ebony, barwood, and other articles and stores; that on the 22d November, she anchored off the island of Ascension; and on the 24th, while lying there at anchor, accidentally took fire, and together with her cargo was totally destroyed; that Jones worked his passage to England, and arrived in London perfectly destitute in February, 1835. The summary petition concluded by stating that the mariner well performed his duty, part of the time as seaman, and part as cook.

The *King's Advocate* opposed the summary petition. No freight was earned, therefore no wages. In *The Juliana*,<sup>1</sup> and in *The Neptune*,<sup>2</sup> freight was earned. Here it is alleged that the ship and cargo were insured; nothing is said as to the freight; but an insurance by the owner can make no difference to the seaman; for he cannot insure

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<sup>1</sup> 2 Dod. 504.

<sup>2</sup> 1 Hagg. A. R. 227.

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The Lady Durham. 3 Hagg.

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his own wages, and why should he have the benefit of an insurance by the owner? He read, at length, as strictly analogous in every material point, the MS. case of *Thomas v. Tobin*;<sup>1</sup> and argued

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<sup>1</sup> The following report of the case is taken from the King's Advocate's brief:—

THOMAS, Administratrix of THOMAS. v. TOBIN.

Assumpsit by plaintiff to recover 11*l.*, arrears of wages claimed to be due to the intestate, Thomas, who at the time of his decease was employed as cooper and mariner on board the ship *John Tobin*, the property of defendant.

The declaration contained counts for wages as a mariner for work and labor upon an account stated between plaintiff and Thomas in his lifetime, and with plaintiff as administratrix after his decease. Defendant pleaded the general issue, upon which issue was joined, and at the trial of the cause before Hullock, B., at Lancaster, summer assizes, 1822, a verdict was found for plaintiff, damages 11*l.*, subject to the opinion of the court on the following case, with liberty for either party to turn it into a special verdict if the court should think fit.

CASE. The intestate William Thomas was, in 1821, hired as cooper and mariner on board the ship *John Tobin*, of which the defendant was sole owner, on a voyage from Liverpool to Africa and back to Liverpool, and signed the usual articles of agreement for the voyage out and home at the rate of 4*l.* per month wages. The ship sailed from Liverpool on 23d January, 1821, and arrived with her cargo safe on the coast of Africa on the 5th of April following, where she continued trading until the 28th of November following, on which day she sailed homeward for Liverpool. Before her setting sail homeward, and whilst serving on board the said vessel, the said W. Thomas died, namely, on the 26th November, 1821, having served ten months on board the said ship. The intestate's wages for such service at the rate of 4*l.* per month, as aforesaid, amounted to the sum of 40*l.* The sum of 29*l.* has been paid by the defendant to the intestate, and to his order, by way of advance on account of his wages, leaving a balance of 11*l.* due, if the plaintiff be entitled to recover in this action.

The said ship went out on a trading voyage, and not on freight, the custom being to barter the outward cargo in exchange for the produce of the country, and previous to her sailing homewards she had procured a full cargo for Liverpool. The said ship was insured on her round voyage for 8,000*l.*, her value, and the outward cargo for 7,800*l.* being the value thereof. The cargo home was of the value of 22,600*l.*, and was insured for 13,200*l.*, being 9,400 under its estimated value.

The said ship and cargo were totally lost on her voyage home, and all hands perished.

The amount received from the underwriters under the different policies, was 21,200*l.*, for the ship and both cargoes. The voyage was a losing one to defendant.

Plaintiff hath duly administered to the effects of the said W. Thomas, who died intestate.

The question for the opinion of the court is, whether the plaintiff is entitled to recover the said balance of 11*l.* for the wages of the said intestate up to the said 26th of November, 1821, the day of his decease as aforesaid.

If the court is of that opinion, then a verdict is to be entered for the plaintiff, otherwise a nonsuit is to be entered.

J. Parke, for the defendant.

Case argued and judgment given for defendant.

[ \*198 ] \* that if all the circumstances in this summary petition were proved, the action must fail.

*Addams, contra.* The case of *Thomas v. Tobin* is not reported, and is new to me; it would seem to govern the present case; but if the law be so, it inflicts a great hardship upon the seaman; the policy of the law does not allow a seaman to insure wages; and it is argued that the same policy will bar him from recovering against an owner who has insured; but if so, the loss of the ship may be a profit to the owner, by saving the wages; but the application of the principle is too slight and remote to affect this question. Here the [ \*199 ] \* owner insured the return voyage upon the information of his own captain; and though it is true that freight is not insured, yet in a voyage of barter there would, I apprehend, be no insurance of freight. In the case cited, the seaman died before the ship was lost, and when the cargo was not quite complete; here, after the cargo was complete, and on her voyage home; however, I confess, I cannot see any material distinction between the two cases; but cases of wages are favorable to the mariner, and the court will at least admit the summary petition.

SIR J. NICHOLL. This summary petition is opposed on the ground that if all the circumstances were proved they would not avail. The suit is against the owner of the ship and of "the cargoes [ \*200 ] lately laden on \* board,"<sup>1</sup> but a mariner has no lien on the cargo, as cargo; his lien is upon the ship and on the freight as appurtenant to the ship; and so far as the cargo is subject to freight he may attach it as a security for the freight that may be due. Here, however, the ship and cargo are all destroyed. In the summary petition the voyage is thus described — "Designed on a trading voyage from Liverpool to the coast of Africa and back to Liverpool;" and it is so described in the ship's articles, and that the seaman shipped for such intended voyage: it is also described as one voyage, with no other port of delivery than Liverpool.

[The court then adverted to the rest of the summary petition.]

Such are the facts as stated in the summary petition; and it is not suggested that the voyage was to be broken into parts; there was no separate voyage, nor delivery of cargo at distinct ports: it was all one voyage, and quite as much one transaction as a Greenland fishing voyage. It is not alleged that any freight was received or became due and was engaged to be paid; and indeed that could not

<sup>1</sup> The suit was so entered, and described in the heading of the summary petition; but there had not been any warrant extracted in the cause.

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The Lady Durham. 3 Hagg.

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well be, because the ship and cargo belonged to the same owner. The goods for the return voyage were taken in barter; and whether they would produce a profit or not, would depend on the state of the market upon the ship's arrival at Liverpool. It is thrown into the summary petition that the owner had effected insurances on the homeward cargo, but that will not give the seaman a legal right to wages; it may \* induce the owner to act with liberality, [ \*201 ] but it cannot induce me to violate a principle and rule of law, whatever may be the hardship on the seaman. The policy of the law requires that a seaman should not insure his wages;<sup>1</sup> he must take the risk of the ship and stand by her at every hazard: he has a lien on the ship to the last plank, and on the freight which is appurtenant to the ship; and I think that, in principle, the King's Advocate's argument is not remote, and that an insurance of the ship does not benefit the seaman; for if a seaman could look to the insurance of the ship, as a security for his wages, it would be a substitution for his own private insurance, and would defeat the policy of the law. A seaman generally knows whether the ship be insured or not, and if such an insurance could enure to his advantage, it might make him indifferent, and moderate, if not extinguish, all exertion on his part. Whether, if any cargo were saved, it could be held to represent the freight, I give no opinion: it might raise a very different question from the present: here the goods taken in barter were destroyed and lost; so that no freight could accrue. Without then relying on the MS. case that has been cited, I am of opinion, as I was before I heard it, that the seaman cannot recover his wages in this instance. The insurances effected on the cargo cannot be taken as the freight itself earned and made, which they must be if they could be saddled with wages: the cargo would then be made to represent freight; the insurance freight, and thus the seaman become entitled: but I know of no case where it has been held that a seaman could proceed for wages against assurers.

\* If any portion of the ship be saved, the mariner, to that [ \*202 ] extent, has a lien on the thing for wages: it was so held in *The Neptune*.<sup>2</sup> So in a divided voyage, where there has been a delivery of cargo at different ports, and freights earned at those different ports, wages would be due *pro rata*, though the ship should be lost before she came to the final port of discharge: such was the case of *The Juliana*,<sup>3</sup> in which there was considered to have been so many

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<sup>1</sup> [*Pitman v. Hooper*, 3 Sumn. 286; *The Neptune*, 1 Hagg. Ad. R. 239; *The Juliana*, 2 Dod. 509.]

<sup>2</sup> 1 Hagg. A. R. 238.

<sup>3</sup> 2 Dod. 504.

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The Industry. 3 Hagg.

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separate voyages, and freight made in each; and the court went in that case so far as to say, that an introduction into the articles of a special clause restricting the seaman's demand, would not defeat it.

A mariner, it is true, may be entitled to wages even if no freight be earned, as where a vessel sent out upon a seeking voyage, in search of freight, and obtains none; but why? Because if she arrives home in safety, the man, by his contract, has a lien on the vessel; he may proceed *in rem*: and, therefore, though the freight be the mother of wages, and where freight is made wages are due, yet it does not follow in all cases that if there be no freight there can be no wages.<sup>1</sup> The court has every disposition to assist this class of men; yet in this instance, there being only one adventure of barter; there being no divided voyage; no freight made or to be received, I am bound to decide in conformity with the general rule of law — that freight must be earned for wages to enure — and I therefore reject the summary petition.

[ \* 203 ]

\* INDUSTRY, Davis.

May 1, 1835.

The amount of salvage, for services performed with risk and labor, in the English Channel, by a pilot and his crew, five in number, from the 16th to the 13th of January, was, on a bond of reference to the commissioners of pilots at Cowes, fixed, on a value of 2,000*l.*, at 120 guineas and the expenses: the owner having refused payment, the same sum was, in an action by the salvors, decreed with costs.<sup>2</sup>

SALVAGE, by a pilot and his crew, to a ship off Dunnose, and brought into Cowes. Value of ship, cargo, and freight, 2,000*l.* Under a bond of reference, of "submission" as it was termed, to Mr. Spain, Lloyd's agent, and Mr. Estwick, comptroller of the customs, (both sub-commissioners, under 6 Geo. IV., c. 125, s. 5, for reporting as to the qualification of pilots, for the district of the Isle of Wight,) an award of 120 guineas (besides the expenses) had been made: but the owner having refused payment, an action was entered and bail given by him in 250*l.*

*King's Advocate* and *Curteis*, for the salvors — The award is not

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<sup>1</sup> See *The Malta*, 2 Hagg. A. R. 158, 162.

<sup>2</sup> [For cases as to salvage claims by pilots, see *The Frederick*, 1 W. Rob. 17.]

excessive, and it was made by competent men ; and payment having been delayed, the court is at liberty to give a further sum.

*Burnaby*, for the owners. The commissioners have no authority in matters of salvage ; they have made an excessive award, at the rate of 16*l.* per hour, for what was scarcely more than pilotage.

SIR J. NICHOLL. The *Industry*, of 290 tons and thirteen hands, having been damaged, on her voyage from Newcastle to New York, by a violent storm in the English Channel, about two, A. M., on the 16th of January, was, on the afternoon of that day, boarded by a pilot, of the smack *Alarm*, (of 40 tons and five men,) taken in tow by him, anchored successively at St. Helens and Spithead, and got into Cowes about two, A. M., on the 18th. The master of the brig, and *Greenham*, the master of the smack, \* signed a [ \* 204 ] bond of reference and arbitration to Mr. Spain and Mr. Estwick, sub-commissioners of pilots, and on the 21st they awarded 120 guineas, besides the usual expenses, altogether making 143*l.* Mr. Junius Smith, the owner, refused to pay this sum : a warrant of arrest was extracted, and bail given in 250*l.* — an eighth of the agreed value of the ship, cargo, and freight. The case does not come before me on appeal from an award, because no award has in this instance been made according to the salvage act ;<sup>1</sup> nor is there any tender : the question therefore is, what is due ?

The amount of remuneration must depend on all the circumstances. It is not a mere question of work and labor, not a mere calculation of hours, though time undoubtedly is an ingredient ; but there are various facts for consideration — the state of the weather, the degree of damage and danger as to the ship and cargo, the risk and peril of the salvors, the time employed, the value of the property ; and when all these are considered, there is still another principle — to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity. Here, in the middle of winter, is this vessel — with her rigging damaged, sails torn and split, seams open — quite unfit to proceed on her voyage — with a necessity of getting into port, and with a signal for assistance — boarded by a pilot and one of his men from a skiff at con-

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<sup>1</sup> The referees were commissioners appointed under 6 Geo. IV., c. 125, to report as to the qualification of pilots ; but had no legal authority in salvage.

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The Marianna. 3 Hagg.

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[ \*205 ] siderable \*risk, and the sea being so much agitated that the body of the vessel could not at times be seen; and what also shows the risk in boarding is the fact, that the man who boarded with the pilot, himself a second class pilot, a person of skill and knowledge, took off part of his clothes lest the vessel should be capsized. It is true, boarding is part of a pilot's duty, but here was special risk.

What, then, is the nature of the service rendered? It is not pilotage. The signal was not for a pilot, but for assistance; it was to take this vessel in tow, and towing is no part of a pilot's ordinary duty. She was taken in tow, and on the evening of the 16th anchored at St. Helens; the next day they got to Spithead, and on the 18th into Cowes roads — all this not without some degree of danger to the towing vessel, and the pumps of The Industry occasionally resorted to. The ingredients, then, of this service, and the merits of the salvors, (and there is not the slightest imputation of blame against them,) are such as require a considerable remuneration; and I am not prepared to differ in opinion from the referees; they are persons described as filling respectable situations, and are likely to keep impartially in view the interests of the navigation of the country. I think the owner and underwriters ought to have been satisfied with their award; and I pronounce for the same amount of salvage, and the same expenses; and as the owner refused payment, and thus obliged the salvors to resort to this court, he must pay also the costs of this action.

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[ \*206 ]

\* MARIANNA, Dos Santos.

May 1, 1835.

After a decree of condemnation, in the Vice-Admiralty Court at Sierra Leone, of a Brazilian schooner, as a slaver, had — on a claim by the Brazilian consul in behalf of Brazilian subjects, as to some goods on board at the time of the seizure — been rescinded, and a decree of one eighth, as due on recapture — the remaining seven eighths to be droits, if unclaimed — substituted; a further decree of condemnation, upon a new libel at the instance of the seizors, was made in their favor of those seven eighths, but still with a reservation as to the goods claimed. There was no appeal nor suit in this court in respect of these decrees; but the proceeds of the seven eighths having been paid into the registry here by a treasury warrant, an application for payment of this money to the seizors — founded on the processes from Sierra Leone, an affidavit of the seizors' navy agent, and the non-intervention of the treasury — rejected, there being no legal title in the seizors. Unclaimed residue, after payment of salvage on recapture from pirates, are droits.

An application, on the 29th November, 1833, was made for the

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payment of 980*l.* out of the registry to Mr. Stilwell, agent to Captain Griffinhoofe, of H. M. S. Primrose, and other seizors. The above sum was seven eighths of proceeds arising out of a capture by The Primrose, off Lagos, on the coast of Africa; and having been paid into the military chest at Sierra Leone, was transmitted to this court by the paymaster-general of the forces, in pursuance of a warrant from the Lords of the Treasury. The application was supported by Mr. Stilwell's affidavit, and two processes from the Vice-Admiralty Court at Sierra Leone. The first process contained a libel, on behalf of the seizors, against The Marianna, as a Brazilian schooner, and her cargo, recaptured from pirates on the 30th August, 1828, and praying salvage. There was a further libel or information on the 12th of November, 1828, alleging that she was a Brazilian fitted out for the slave-trade, and praying a condemnation of the ship and cargo as forfeited to the seizors; and the process contained the sentence of condemnation, dated 3d January, 1829, in conformity with that prayer. It further contained a claim made on the 27th of January, by the Brazilian consul on behalf of Brazilian subjects, for goods on board taken from The Effigenia; and upon that claim the judge rescinded the sentence of condemnation, decreed one eighth to be due to the recaptors, and the residue to remain as droits of admiralty, subject to any claims within due time.

\*The second process contained a libel on behalf of Cap- [\*207] tain G. against the remaining seven eighths. It recited the former proceedings, and the recapture, and alleged that no person could make a legal claim, as the schooner was a slaver; and that no part of the property on board had belonged to The Effigenia, also a slave trader, and prayed that the whole proceeds might (as originally) be decreed to the recaptors. This libel was dated on the 26th March, 1829, and on the 6th of April the court at Sierra Leone adjudged the said seven eighths as good and lawful forfeiture to H. M. S. Primrose, but directed that the goods (said to have been taken from The Effigenia) were to remain as droits. This sentence was also in the process.

SIR J. NICHOLL. As this money has been transmitted to the registry of the court, I cannot direct it to be paid out except upon a proper title. That it should have got here seems rather strange, for there has been no proceeding in this court, either original or by appeal, in the matter; and I am at a loss to discover that the court has jurisdiction at present to make any order regarding the money. At all events, as it has been sent here by the government, there must be a grant from the crown, or some authority produced to which the court



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is bound to attend, before it can be taken out; and it might have been expected that some directions would have been given to the law officers of the crown upon the subject; but here is only an *ex parte* application on behalf of the seisor. The facts are con-  
 [ \*208 ] fined to the two processes, for Mr. Stilwell \* knows nothing in this matter of his own knowledge, and there is no document, no deposition of a witness, no proof exhibited, so far as appears, of any one fact to give a title to the seisor.

But was the Vice-Admiralty Court at Sierra Leone competent, in 1828, to decide upon a question of slave trading, and to condemn Brazilian property on that account? I am not aware of any such jurisdiction in that court. The Mixed Commission Court was then in existence at Sierra Leone, and was the authorized tribunal there, both by treaties and by act of parliament, in offences against the abolition laws.<sup>1</sup> Upon a recapture from pirates, the recaptors might have a lien upon the property for salvage, and be entitled to reward; and on such principle the court at Sierra Leone might properly award an eighth; but the remaining seven eighths would not belong to the recaptors, but would, if unclaimed, belong to his Majesty, in his office of admiralty, as *bona vacantia*. These seven eighths were afterwards proceeded against, by the seisor, as of a vessel engaged in the slave trade, and there was a final condemnation on that ground; but such a sentence will not found a title in the seizors; there has been no legal transfer of it to them, and, according to the second libel, part of the property proceeded against were goods belonging to The *Effigenia*; and yet the sentence referred to them as droits. This seems strange. Seven eighths had before been reserved as droits. Should not, then, the crown have been a party to the subsequent  
 suit? However, being transmitted here, the court may de-  
 [ \*209 ] cide who are legally entitled; and before even \*the crown can grant them, it must first be decided that they belong, and in what character they belong, to the crown. The exact value of the *Effigenia*'s goods is not of much importance; but of whatever value, how does it appear from those proceedings that they do not form a part of this 980*l*.? It is said that the treasury will not interfere. Of that, again, I am not judicially informed; but the treasury is not the proper quarter, for, in my apprehension, the goods are subject to condemnation as droits; and this court must take care not to confound two branches of the executive government established by custom. I reject the motion.

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<sup>1</sup> See 58 Geo. III. c. 85; 5 Geo. IV. c. 113, s. 52 *et seq.*

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The application was now renewed, upon exhibiting a letter to Captain E. J. Parrey, (formerly lieutenant of The Primrose, and senior surviving officer of that ship,) acquainting him that the Lords of the Treasury had directed the King's Proctor to declare, on behalf of his Majesty, "that he does not oppose any appropriation of the proceeds which the Court of Admiralty may think fit to direct;" but the court, advertng to the view taken by it upon the former application, observed that the letter did not vary that view of the case, and again rejected the motion.<sup>1</sup>

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EWELL GROVE,<sup>2</sup> Burton.

May 9, 1835.

Salvage by a government steamer, and 200 men, to a vessel in extreme danger on a shoal off Jamaica. She had been there from 21st to 24th July, when a signal of distress brought to her assistance a steamer, carrying despatches, and in about eight hours she was moored in safety, and on the next morning towed into Carlisle Bay. The magistrates there, upon a value of about 6,000*l.*, gave to the salvors one third of the ship, cargo, and freight; but the owners refusing to abide by that decree, the court here, in an action by the salvors, gave 1,200*l.* and costs.

SALVAGE, by H. M. steam-vessel Rhadamanthus, at Jamaica. The salvors valued the ship at 3,500*l.*, freight 300*l.*, and cargo at 2,540*l.*, together \* being 6,340*l.* The owners alleged that the [ \* 210 ] value of the cargo saved was 2,283*l.* They gave bail in 2,300*l.*

The protest stated that John Burton, master of The Ewell Grove, of 290 tons, with a cargo of sugar, rum, coffee, and other merchandise, bound from Jamaica to London, set sail with the same from Morant Bay for Carlisle Bay, on the 21st July; "that in the prosecution of such voyage, at 6 P. M. of that day, he came abreast of Port Royal; at 8 P. M. rounded Portland in seven fathoms water, double reefed the fore top-sail, single reefed the main top-sail, and hauled the foresail up, keeping the lead constantly going; that finding she gradually shoaled, the water from seven to three fathoms, he put the helm starboard, but that in running out she grounded on Robertson's Shoal, when the master immediately stowed the sails, started all the

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<sup>1</sup> See Anglo-Sicilian captures, p. 192.

<sup>2</sup> [For case as to salvage by king's ships, see The Mary Ann, 1 Hagg. Ad. R. 158, note.]

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The Ewell Grove. 8 Hagg.

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water, ran out a kedge on warp, and endeavored to heave her off, but without effect; that he sounded all round the vessel, found between nine and eleven feet water, and that she had sued fifteen inches; that at daylight on the 22d he sent down the top gallant yards, masts, and mizen topsail, and went on shore to obtain assistance; at 7 A. M. returned on board, having procured two boats and fourteen men to assist; that the bower anchor with stream chain was run out astern and hove taught, when they rigged the derrick and commenced lightening the ship; that on the following day they continued discharging the cargo, heaving at different times on the stern chain, but that they could not move her; that, at 10 A. M. on the 24th, H. M. steam-vessel Rhadamanthus was observed coming round Rocky Point, [ \*211 ] \* when a signal of distress was hoisted, and at 11 A. M. the first lieutenant of the steam-vessel came to make inquiries; and at noon the master of The Ewell Grove and the pilot went on board The Rhadamanthus, and being brought within seventy fathoms of The Ewell Grove, appearer got a large hawser end from the steam-vessel made fast, when she put on her steam, but that the hawser was broken; that he then bent on one of his chains, and endeavored to heave her off, but finding they could not move her, they recommenced discharging the cargo, fourteen men being still employed from the shore, and at 8 P. M. again hove on the chain, when they succeeded in drawing her off into fifteen feet water, and mooring her for the night; that at 3 A. M. on the 25th the steam-vessel sent a tow rope, with thirty men, to assist in getting the stern anchor and chain, and at 6 A. M. they began towing her round to Carlisle Bay, where, at 8 A. M., she came to anchor in three and a half fathoms water, and commenced taking in the discharged cargo, which was continued throughout the 26th to the 31st, ten men from the shore being retained during the whole of that period; that on the 29th of July the harbor-master, with assistants, came from Kingston, and after having surveyed the ship, reported her seaworthy, but that the keel and copper on the bottom were much rubbed; that several puncheons of rum and hogsheads of sugar were broken, owing to the heavy swell whilst the boats were alongside, and the confusion was so great that no correct account could be kept of the quantity delivered; that the tow line and the sea buoy rope, together with a warp, long-boat, anchor, and cable, and a large kedge flook, with four hand- [ \*212 ] \* spikes and capstan bars, were broken or otherwise much injured; that the long-boat was stove, and much cordage lost."

This protest was noted in London on 27th of September, 1834, and

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extended on the 2d of October, and sworn to by the master, mate, and carpenter.

The affidavit of the salvors, sworn on 22d April, 1835, was as follows:—

“ George Evans, Esq., late commander, William Simpson Blount, Esq., late first lieutenant, George Thomas Gordon, Esq., late second lieutenant, Henry Hodder, late master, and Campbell France, late surgeon, of H. M. steam-ship *Rhadamanthus*, made oath, that on the morning of the 24th of July last, (1824,) H. M. said ship was despatched from Port Royal to proceed round the island of Jamaica with troops and clothing for the police, with positive orders to return to Port Royal by the 30th of that month, and that about 11 A. M. on the said 24th, when H. M. said ship was rounding the point of Portland, a vessel was discovered on shore on Rocky Point, with a signal of distress flying, whereupon H. M. said ship altered her course and stood towards the said vessel, and having neared her, a boat was despatched under the command of then Lieutenant Blount with the carpenter, for the purpose of ascertaining and reporting to Captain Evans, whether he could render her any assistance. Lieutenant Blount accordingly proceeded with the carpenter, and having ascertained that the vessel *Ewell Grove* had struck and was lying on a reef of rocks and thumping very heavily, that there were only five of her crew \* on board including the master and mate, exclusive of [ \* 213 ] some negroes, to assist in navigating her from one part of the island to another, that Lieutenant Blount then immediately commenced taking soundings round the said vessel, and found that she had ten feet water close under her stern, and he also sounded from the said vessel to H. M. said ship in order to ascertain if there was a passage from H. M. said ship to approach the said vessel, and he then returned to *The Rhadamanthus*, and reported to Captain Evans that the vessel was in such peril that if the wind, which was then blowing on shore, were to increase, she must inevitably become a total wreck, but that if it were possible to take H. M. said ship close to *The Ewell Grove*, there might be a chance of getting her off; that after some hesitation on the part of Captain Evans as to the propriety of risking the safety of H. M. said ship in so perilous a situation, it was determined at length, aided by the directions of the man who had been brought on board by the first lieutenant, to approach *The Ewell Grove* as close as possible, and H. M. said ship having approached to within about 100 fathoms of *The Ewell Grove*, was brought to an anchor in  $3\frac{1}{2}$  fathoms water, when she was veered in towards the reef, and her head brought round to an anchor that had been let go, and her stern

was then in three fathoms water, which gradually shoaled to within about twenty fathoms of The Ewell Grove, where there were only ten feet water; that Captain Evans thereupon immediately repaired on board The Ewell Grove, and fearing from the situation in which

he found the vessel that he should be detained longer [ \* 214 ] than he had originally expected, he determined to \* send

a despatch to the commodore of the station, stating the cause of the detention of H. M. S. and excusing his disobedience of orders. In consequence, however, of The Ewell Grove striking so very heavily on the rocks, he was unable to write it, and was obliged to return to H. M. S. for that purpose, when Lieutenant Gordon was sent on shore with the despatch to the commodore of the station; that five boats of H. M. said ship were manned and rowed towards The Ewell Grove, and after great difficulty some of the crew succeeded in getting on board The Ewell Grove, when they found the mate so drunk that he was quite incapable of rendering any assistance; that after The Ewell Grove had been lightened by taking out some of her cargo, her windlass was manned and two of the anchors belonging to that vessel, which had been previously carried out by the crew of The Ewell Grove towards the land ahead of the larboard bow, were hove in by part of the crew of H. M. said ship, who thereupon got out two of her stoutest hawsers, and made fast the end of one of them to the starboard quarter of The Rhadamanthus, and the other to her larboard quarter, and then carried and fastened them to the bit heads and windlass of The Ewell Grove; and in order to get a still greater purchase upon the said vessel, an anchor and cable of about eleven cwt., belonging to The Ewell Grove, was carried out by the crew of H. M. S. some distance, to the starboard bow of The Ewell Grove, bearing towards the place where H. M. S. was lying at anchor, and there let go, a turn having previously been taken with the other

end of the said cable round the windlass of The Ewell [ \* 215 ] \* Grove, which was thereupon manned by from fifteen to twenty of the crew of H. M. S. who had been employed in the boats lightening the cargo of The Ewell Grove and carrying out the anchors and cables, having returned on board their own ship; the full power was applied to the steam-engines, and the capstan of H. M. said ship was also manned, and after about an hour of incessant labor at the capstan of H. M. said ship and at the windlass of The Ewell Grove, the largest hawser belonging to H. M. said ship broke about midway between the two vessels, with great risk to the men in one of the boats, who were holding on by the hawser at the time. That the said hawser having been repaired, the same manual and steam power was again applied, and in about half an hour the smaller hawser be-

longing to H. M. said ship also broke, whereupon that was immediately repaired by the men in the boats with a new messenger, but in consequence of the tremendous strain it broke a second time in a different place, and was again in like manner repaired; that part of the crew of H. M. said ship were thereupon again despatched to The Ewell Grove, to assist in again trimming and further lightening the cargo, and by a survey which was then made, it was found that the larboard bow of The Ewell Grove was lying in nine feet of water only, and in rough rocky ground; that in consequence thereof, the stream chain belonging to H. M. said ship was then taken out, attended with very great labor from its immense weight, and made fast round the foremast of The Ewell Grove, the other end having previously been fastened to the starboard quarter of H. M. S., and as it was getting dark and bad \* weather apparently coming on, the [ \* 216 ] best bower anchor belonging to H. M. said ship was carried out and let go, and the engines having been again put in motion, and the windlass and capstan of both vessels manned, after two hours' more incessant labor, The Ewell Grove began to veer round with her head towards the sea, and was moved about eight or ten feet from her former situation, where she again became fixed on the rocks, from whence, however, by a continuance of the force applied, she was eventually hove off about 8 P. M., whereupon the two anchors that had been let go and fastened to the windlass of The Ewell Grove, were hove in, and H. M. said ship, with that vessel in tow, stood out towards her own anchor; and The Ewell Grove having been lashed to H. M. said ship, both vessels remained in that situation until the following morning, when the boats of H. M. said ship having been manned, were despatched to The Ewell Grove for the purpose of assisting those of the crew of H. M. said ship who had remained on board The Ewell Grove during the night in clearing the deck or otherwise preparing her for sea, when The Rhadamanthus, with The Ewell Grove in tow, stood out from Rocky Point through the reefs and arrived in Carlisle Bay, where The Ewell Grove was thoroughly examined by the carpenter of H. M. said ship, and reported to be in a fit state to proceed on her voyage; that the said John Burton, the master of The Ewell Grove, then represented to Captain Evans that if he did not leave the island on his homeward voyage before the 1st of August, he should be liable, agreeably to custom, to double insurance; and that it would be impossible for him so to do, not \* having men sufficient to navigate his ship, whereupon three [ \* 217 ] of the able seamen of H. M. said ship Rhadamanthus were supplied to him for that purpose, who proceeded with The Ewell Grove to England; that prior to the said vessels parting company, the

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said John Burton, the master, delivered to the said George Evans, a certificate in the following words:—

“These are to certify that H. M. steam-ship Rhadamanthus, in consequence of a signal of distress, I caused to be hoisted on observing her pass yesterday, came to the assistance of the bark Ewell Grove, which I command, when on shore on Rocky Point where she had unfortunately struck on the 21st inst., and having anchored close astern, succeeded after very great exertions, and the aid of steam, in heaving the bark off.

“To the assistance thus afforded by The Rhadamanthus I attribute the present safety of the ship and cargo, and she was striking very hard, and no other but a steam-vessel, surrounded as we were by rocks and shoals, could have approached sufficiently near to have effectually saved her.

“The Rhadamanthus has towed The Ewell Grove into Carlisle Bay, where she is anchored in safety. I did not think it necessary to accept of the kind offer made by Captain Evans of towing her to Port Royal, as his carpenter could not discover any defect of consequence, and she does not leak. Given under my hand, on board the bark Ewell Grove, of London, in Carlisle Bay, Jamaica, the 25th of July, 1834.

“JOHN BURTON, *Master.*’

“And the said Henry Hodder and Campbell France made [ \*218 ] oath that the said certificate was \*written in the gunroom of

H. M. said ship by the purser, who is at present at Jamaica, in the presence of these deponents and the said J. Burton, and for the most part from his dictation; that when the same was finished, the purser handed it to the said Burton, who read it over, and upon the said purser asking him if it was correct, Burton replied, ‘quite so,’ and signed it; that Captain Evans was not in the gunroom at any period of the time that the said paper was so dictated by the said Burton and written by the purser as aforesaid, and that he did not in any manner interfere in the preparation thereof. And all these deponents made oath that the officers and crew of H. M. said ship were engaged from 11 o’clock, A. M., until between 10 and 11 o’clock the same night before they finally succeeded in getting the said vessel, Ewell Grove, safely afloat, during the whole of which period they were employed as aforesaid, and in consequence of the wind blowing fresh on shore with a heavy sea, the whole of the boats of H. M. said ship were more or less damaged in the gunwales and sterns, and several of the oars lost; that they were frequently compelled to bale the water out of the boats to prevent them from being swamped, whilst endeavoring to get on board the vessel, the carrying the anchors and hawsers

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out, and in their attending upon and repairing the cutter when broken, whereby the crew of H. M. said ship incurred great risk and peril of their lives, and were much exhausted from the fatigue and labor, having been closely and constantly employed from the commencement of their services until they succeeded in getting The Ewell Grove afloat; that on the following night it came on to \*blow very hard, with the wind in the same quarter, and [ \*219 ] direct on shore, and that if the Ewell Grove had not been previously got off, she would have very shortly become a total wreck; that The Rhadamanthus is a first class steam-ship, with two engines, each of 100 (at least) horse-power, and that she had on board a crew of about 120, including officers and men, and also eighty soldiers and officers; that in addition to the full power of steam, 60 men were almost constantly employed at the capstan of The Rhadamanthus, and in heaving up to their own anchor, and about 20 men at the windlass of The Ewell Grove heaving towards the two anchors that had, as aforesaid, been carried out; that it would have been impossible without the assistance of a steam-vessel of the size and power of The Rhadamanthus to have got the vessel afloat, inasmuch as the tide ebbs and flows very little where the vessel was lying on the rocks; that what had been done by the master and crew of The Ewell Grove in attempting to get her off the rocks, prior to the arrival of H. M. said ship, had only tended to hurry The Ewell Grove to her destruction, inasmuch as the crew of The Ewell Grove had commenced taking out the cargo, before she had been sufficiently secured by backing her anchor in order to prevent her forging further on the reef; that after the arrival of H. M. said ship at Port Royal, meeting of the magistrates was convened for the purpose of inquiring into the particulars of the salvage services and awarding compensation, and after a most minute examination on oath of these deponents, (to wit, Evans, Hodder, Gordon,) and Mr. Heard, the mate, who were severally cross-examined by David Cohen, Esq., (one of the consignees of The Ewell Grove,) the [ \*220 ] following award was made by the court: <sup>1</sup>

“We, the magistrates convened under an act of the island, 53 Geo. III., c. 25, to adjust the *quantum* of salvage to H. M. S. Rhadamanthus, for the salvage of The Ewell Grove and her cargo, on the 24th day of July last, having taken the examinations of witnesses, and heard what could be alleged by David Cohen, Esq., the consignee of the said bark, do hereby find and adjust the salvors to

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<sup>1</sup> The examinations, as well as the award, were among the papers before the court.



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be entitled to one third of the value of the bark, one third of the cargo, consisting of 107 hogsheads of sugar, 3 tierces of sugar, 12 tierces of coffee, 49 puncheons of rum, 29 tons of logwood, 44 lancewood spars, 1 teacle, and 3 kegs of tamarinds, together with one third of the freight of such cargo to London, and do hereby award the same to be paid by the owners to Captain Evans, to be by him apportioned among his officers, seamen, and marines, according to the usage and custom of the navy in such cases."

*King's Advocate* and *Phillimore*, for the salvors.

*Burnaby* and *Addams*, *contra*, cited *The Mary Ann*,<sup>1</sup> *Frances Mary*,<sup>2</sup> and *Salacia*.<sup>3</sup>

SIR JOHN NICHOLL. This case was very fully and ably argued on the last court day; it is of some magnitude and importance: several adjudged cases were referred to, and the court wished to look into them before its decision; but it seldom happens that in cases [ \*221 ] of salvage there is much of application; each case \* depends on its own circumstances; yet generally some principle may be extracted from previous decisions; and one principle contended for is, that the proportion of reward is not so great where the property is large, as where it is small, that where it is 60,000*l.* it is less than where 6,000*l.*: the value of the property saved is certainly not an immaterial circumstance, for in proportion to that value is the benefit to the owners, and that is one of the primary principles in settling the amount of remuneration. In cases of recapture, the rule of proportion was the sole rule; it was the only circumstance adopted by the legislature:—whether the recapture was effected after a severe action, and the property very small, or whether it was effected without resistance, and was of great value, still the proportion was the same. This had not formerly been the case; but, after some experience, the legislature deemed it best to fix a definite proportion, and to give one eighth. But in civil salvage, for mere assistance to ships in distress, there is no fixed proportion applying to all cases—there is a discretion. In derelicts, indeed, there are in practice some limits; where an owner appears, there is, I believe, no instance in which more than half, though seldom less than one third is given. In the great case of *The Thetis*,<sup>4</sup> where the property was immense and the efforts of the salvors of the most extraordinary and meritorious kind,

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<sup>1</sup> 1 Hagg. A. R. 158.

<sup>2</sup> 2 Id. 89.

<sup>3</sup> 2 Id. 262.

<sup>4</sup> *Supra*, p. 14.

indeed quite unexampled, the sum finally given was, after all deductions, scarcely less than one third. But I repeat, that in cases of civil salvage there is no fixed proportion.

The facts of most cases have peculiarities of \* more or [ \* 222 ] less weight, which furnish *criteria* for their adjudication; and that observation renders it proper to refer, in the first place, to the facts of the present case. The master states them in his protest, which was noted and extended in the usual way for the satisfaction and benefit of his owners. (The court read the protest.) There are some omissions of details in this statement; but giving credit to the master for the truth of it—it is made on the 2d of October, before the salvage cause commenced—some observations arise upon it. On the 21st of July, this vessel was sailing under a few sails, and those reefed, so that there was considerable wind, the swell also was considerable, and the lead was constantly going; the water shoaled from 7 to 3 fathoms, so that the rock was shelving towards the sea at the place where the vessel grounded; she “sued 15 inches of water at daylight;” “suing,” as I understand, means that the water did not reach within 15 inches of the ordinary draft, so that the vessel must have got pretty high on the rock; and what shows that the chance of getting off was not very favorable, is that on the morning of the 22d the upper masts and yards were taken down. But what was her state on the 24th—what the chance of then getting her off? She was bumping heavily, for her keel and copper were much rubbed; puncheons of rum, hogsheads of sugar were broken, and all the efforts of the two preceding days had afforded no benefit; nor, when the power of steam and of above 100 men came in aid, was the slightest effect produced until she was further lightened.

There is another circumstance respecting which there can be no error. It is mentioned that the \* tides rise and fall but [ \* 223 ] little on that part of the Jamaica coast: at all places tides rise and fall more at spring than at neap tides, but whether much or little, the tide was as unfavorable as it could be to the vessel getting off, for by the almanac it appears to have been full moon on the 20th; about the 22d, then, would have been the highest spring tide, and on the 23d and 24th they would be falling off, and so continue till after the subsequent quarter and change of the moon. The vessel had grounded as high up the shelving rock as the spring tide would carry her, and there was no prospect of her being assisted for some time by the tide; but, on the contrary, her difficulties would be increased.

Such, then, from the master's own protest, were the risk and danger of this ship and cargo, when, on the morning of the 24th, the

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The Ewell Grove. 3 Hagg.

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master describes a steamer, The Rhadamanthus, coming round the point, and immediately hoists a signal of distress. The master, in his protest, especially describes it as a signal of distress; but the owners, willing to soften this fact down, call it a signal of assistance. There is not, I believe, much difference. The master, in his affidavit, indeed, says that it was the appearance of bad weather that induced him to hoist the signal; so that when his own efforts, and those of his crew, with other assistance, had not hitherto availed, and it was of the highest importance to resort to every possible means to get off, fear of a change of weather is stated to be the only reason for hoisting this signal; such an apprehension might well be an additional reason, as it was in July, one of the hurricane months, the

[ \* 224 ] \* most tempestuous season of the year; but I take the fact as sworn to in the protest.

I now proceed to the circumstances under which the assistance was given, and the salvage effected; and for that purpose I rely upon the affidavit made by the commander, the two lieutenants, and the surgeon of The Rhadamanthus.

The court referred to and read that affidavit.

Such are the facts as in this affidavit, and I see no reason to doubt their truth; and from them it is proper to consider what are the chief ingredients to diminish or increase the amount of remuneration. It is true that The Rhadamanthus is one of his Majesty's ships, worked by steam, found and paid at the expense of the public; yet that does not give a title to private individuals to employ and be assisted by them, without remuneration, any more than by any other vessel in the public service. There is no solid distinction between them. King's ships are fitted out for war — to protect the commerce of the country; they are bound to recapture — it is part of their duty; and yet, though armed and manned at the public expense, they are rewarded for the benefit rendered to the individual owner — something less, certainly, than if the recapture be by a privateer; for a privateer has one sixth, while a king's ship one eighth, in the proportion of a third and a fourth. On parity of reason and fair analogy, a similar principle may apply to civil salvage effected by vessels in the public service. And if it be said that in such cases the time

[ \* 225 ] of the \* salvors is not sacrificed, and their property not risked. That is, however, a question between them and the admiralty; for it is to be remembered that in The Thetis there were deductions: the admiralty was repaid for the time of the officers and

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The Ewell Grove. 3 Hagg.

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men, and for the expenses.<sup>1</sup> In the present case it does not appear whether the admiralty will, out of the salvage, stop the pay or make good any damage; but that is a question between the admiralty and the salvors. Again, in *The Lustre*, a government steamer, very recently decided,<sup>2</sup> the owners and underwriters were required to undertake for any damage that might be done; so little was it considered that it was part of the duty of a government steam-vessel to incur risk for private individuals, or that they had a right to her services; and the officers and men were in that case rewarded at the expense of the owners. I have, therefore, no doubt as to the title of his Majesty's steam-vessels, in cases of civil salvage, to remuneration.

In effecting this service, there was no great personal risk, but there was some; boats passing and repassing in a heavy swell on a lee-shore, men carrying out and taking up anchors, hawsers breaking, are circumstances of some risk, and denote much personal labor. But there was considerable risk of another sort — the risk of responsibility. The steam-vessel was on a service requiring despatch; she was under positive orders to return by a certain time, and it was not till after much consideration and doubt that Captain Evans takes upon himself the responsibility, and sends an excuse to the commodore. \*But if any untoward accident had happened, [ \* 226 ] this conduct might have deeply involved the captain, and perhaps also his officers; and I think, therefore, that the incurring such a responsibility was equal to a personal risk of life; but, however that may be, it forms a strong feature in this case.

The other main feature is the peril and danger out of which the ship and cargo were rescued; and the strong probability is, that, but for the assistance of *The Rhadamanthus*, they would have been wrecked. Would not the owners or underwriters, if they could at the time have known of the position of this vessel and property, have readily given one third, or even one half, to have had them safely released? The court certainly cannot proceed on that conjecture; it must be guided by facts; and here it has good evidence in the certificate which the master gave on the 25th of July, the next day after the service. He there attributes "to the assistance thus afforded by *The Rhadamanthus*, the safety of the ship and cargo; and that no other but a steam-vessel could have effectually saved them." This certificate is signed by the master, and yet he now states that it was obtained by contrivance on the part of Captain Evans, and that he

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1 See *The Thetis*, *supra*, p. 39.2 *Supra*, p. 154.

signed it without knowing the contents. Is this true, or is it false? It is folly, at the least, to sign a paper without knowing its contents; but what is of more importance, is not the statement false? It is not only positively contradicted by Captain Evans, but it is proved by his officers that this certificate "was written below in the gun-room, in the presence of the master, in part dictated by him-  
 [\* 227 ] self; \* that it was then handed to him, and he read it over; and being asked whether it was correct, replied, quite so, and signed it." The court must then take this charge against Captain Evans to be false. But there are also the master's declarations *recenti facto*, proved by Mr. Evelyn, the collector of customs at Jamaica, who was on board The Rhadamanthus, and witnessed the whole transaction; and in his affidavit he states that Barton, the master, considered the escape of the ship as providential, and that she must have gone to pieces — not by storm or hurricane, but by the first sea-breeze; and it so happened that on the very next night there was a gale of wind.

Viewing, then, all the circumstances under which this valuable ship and cargo were saved, what is a sufficient reward? The magistrates at Jamaica, upon a reference to them under a local act, gave one third of the value, about 2,000*l*. That award is signed by six magistrates, and was made after the witnesses had been cross-examined by Mr. Cohen, the agent of the ship-owners. What, however, is the nature of that local act, or what jurisdiction it gives, the court has no means of ascertaining. It was not quite an *ex parte* proceeding, for though Mr. Cohen says he had only a "qualified authority," yet, as he attended and cross-examined, he took care, substantially, of the owner's interests. It is also true, that the master and crew of The Ewell Grove were gone; but as there is no material difference between the facts as then stated and the affidavits in the cause, their presence would not, I apprehend, have altered the case. But though

I have no reason to suppose that the magistrates—well  
 [\* 228 ] acquainted, too, \* with the localities—had not the real merits before them, yet their award is not binding on this court, and I am not disposed to go the whole length of it. The property, it was said, is considerable. So is the benefit to the owners—it is proportionate; and they have had the assistance, not only of this powerful steam-vessel, but of about two hundred men—a great number to share in a salvage remuneration. But considering that the vessel, though in extreme danger, was not a derelict, and that the salvage was effected by a steamer in the pay of government, I had proposed to give one fifth, about twenty per cent., and that the owners should pay all the costs; but to avoid any further inquiry into the exact amount of the value of the cargo that has been preserved,

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H. M. S. Thetis. 3 Hagg.

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and which may be necessary if I allot a proportion, I will give 1,200*l.* and costs.

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H. M. S. THETIS.

June 9, 1835.

Prize agents are to retain and pay over to the treasurer of the navy five per cent. on the net proceeds from and out of all civil salvage, and vessels derelict, and moneys arising therefrom.

THIS question came on upon a monition against the treasurer of the navy to repay 976*l.* 3*s.*, paid in error, as alleged, to the prize accounts, being the amount of a deduction of five per cent. from the net proceeds of salvage to H. M. S. Lightning. The payment had been made by Mr. Woodhead, the agent, on behalf of H. M. S. Lightning, but subject to a legal question as to the liability.<sup>1</sup>

\* *Addams* and *Haggard*, in support of the monition. [ \* 229 ]

*King's Advocate* and *Phillimore*, *contra*.

SIR J. NICHOLL. The facts are not disputed — they may be briefly stated. H. M. S. Thetis was lost off the coast of Brazil, with considerable treasure, the principal part of which was afterwards recovered by H. M. S. Lightning, sent to England, and proceeded against as droits of admiralty, but upon a claim on behalf of the owners, it was restored subject to salvage. The salvage ultimately awarded was nearly 30,000*l.*,<sup>2</sup> and the present question is, whether such salvage, but particularly the proportion paid to The Lightning, is liable to a percentage to Greenwich Hospital. Mr. Woodhead, the agent for The Lightning, was called upon to pay the percentage, and he very properly paid it, but under protest, for the purpose of having the decision of the court. The question principally turns upon the 57 Geo. III. c. 127, ss. 1 and 2, though there are some former acts, and

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<sup>1</sup> His Majesty, by his order in council, dated 16th January, 1834, approved of the report of the judicial committee, whereby the sum of 29,000*l.* was allotted for salvage to Thomas Dickinson, Esq., the commander, and the rest of the officers and crew of H. M. S. Lightning, serving under his command, and to Rear Admiral Sir Thomas Baker. The admiral's share had been received by his own agent.

<sup>2</sup> See *The Thetis*, *supra*, p. 14.

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H. M. S. Thetis. 3 Hagg.

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one subsequent, which may assist in the construction of the 57 Geo.

III. c. 127. The title and first two clauses of that act are in [\* 230] these words;<sup>1</sup> [the court read \* them;] and they show that the statute is not confined to matters merely of prize.

It is not wholly immaterial in construing this act, if there can be any doubt upon it, to recollect upon what principle this percentage was given to Greenwich Hospital; it was not as a penalty on the officers and seamen of H. M. service; for if so, it would be entitled to be construed strictly in their favor; but it was given as a liberal and equitable contribution, on the part of officers and men who are so

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<sup>1</sup> "An act to settle the share of prize money, droits of admiralty, and bounty money payable to Greenwich Hospital, and for securing to the said hospital all unclaimed shares of vessels found derelict, and of seizures for breach of revenue, colonial, navigation, and slave abolition laws.

"1. Whereas doubts have arisen whether by virtue of the several laws now in force the percentage heretofore payable to the royal hospital for seamen at Greenwich out of all prize money, droits of admiralty, and bounty money, continued to be payable to the said institution after the expiration of the hostilities which existed at the time provision was made for the payment of the said percentage; and it is expedient that further provisions and regulations should be made relating thereto. Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that immediately after the passing of this act, the said royal hospital for seamen at Greenwich in the county of Kent, shall be and are hereby declared to be entitled to receive the sum of 5l. per centum, not only upon all prizes taken by any of his Majesty's ships or vessels up to the termination of the said hostilities, but also upon the net proceeds of all prizes taken and condemned since the 17th day of June, 1814, and upon all grants made to the royal navy or marines, and upon all bounty moneys and seizures under the revenue, colonial, navigation, or slave abolition laws; and also upon all droits of admiralty whatsoever which shall have arisen and become payable, or shall be distributable to or amongst the officers and crews of any of his Majesty's ships or vessels since the said 17th day of June, 1814.

"2. And be it further enacted, that from and after the passing of this act, all and every prize agent and prize agents already appointed or hereafter to be appointed by virtue of any act now in force, or of any prize act hereafter to be passed, shall, from and out of the net proceeds of all prizes taken and condemned since the said 17th day of June, 1814, and from and out of the net proceeds of all bounty bills, and of all seizures under the revenue, colonial, navigation, or slave abolition laws, and of all moneys arising from derelicts, and of all grants whatsoever which shall respectively have come into their hands since the said 17th day of June, 1814, and are not yet distributed, or shall hereafter come into their hands, retain for the use of the said royal hospital, and shall within ten days next after the account of the said moneys shall have been examined and certified by the examiner of naval prize accounts, or if there should be no such officer, then within ten days from the notification of any distribution of the said moneys, pay over to the treasurer of the said royal hospital, or his deputy, or to any person to be appointed by such treasurer by writing under his hand and seal to receive the same, for the use of the said royal hospital, the sum of 5l. per centum on the net proceeds of every such prize, grant, or other moneys."

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fortunate as to receive something beyond their pay, towards the support of this institution, and in aid of those funds from which possibly even some of the contributors themselves might receive benefit. Such \* has been the principle on which the legis- [ \* 231 ] lature has, at various times, allotted this percentage — not I repeat, as a penalty, but as a liberal and humane contribution to support this most valuable and splendid institution.

It may not be improper to trace back this principle; it is well known that all prize, arising from capture, is *prima facie*, in the crown, and is now derived from the crown under different acts of the legislature. Immediately upon letters of marque and reprisal issuing — the modern mode of proclaiming war — an order in council disclaims, on the part of the crown, all interest in captures after condemnation and final adjudication to the captors; and there may be good reason for the crown not parting with its interests till the \* property is so disposed of. On this foundation the [ \* 232 ] Prize Acts rest. The title of the 45 Geo. III. c. 72 is, “An Act for the encouragement of seamen and the better and more effectually manning H. M. Navy.” Such also is the title of the 33 Geo. III. c. 66. The Prize Acts regulate the distribution, and the appointment of agents for distribution; and I am not aware of any other than the Prize Acts under which bodies of men collectively can appoint agents for distribution of prize; and where other acquisitions are to be distributed, still the distribution is to be made by agents denominated in these acts prize agents.

At first the percentage was confined to matters of prize, and that only upon unclaimed shares; the earliest statute was 46 Geo. III. c. 100, the title of which is, “An Act to empower the commissioners and governors of Greenwich Hospital to make certain allowances to old, infirm, wounded, or disabled officers in the royal navy; to provide a fund for the payment of such allowances, and for the increase of pensions to disabled seamen and marines.” By the second section of that act, prize agents are to retain for the use of Greenwich Hospital 1*l.* 13*s.* 4*d.* per cent. on the proceeds of prizes, and to pay it over to the treasurer. The third section directs a like percentage on the amount of the droits of admiralty to be retained; and the fourth also on bounty money. The very next act — 46 Geo. III. c. 101 — directs “prize agents to retain 3*l.* 6*s.* 8*d.* out of the net proceeds of prizes for the use of Greenwich chest;” both together making a percentage of 5*l.*, (and this was the first act by which a percentage was given,) but still confined to proceeds \* of prize [ \* 233 ] of war. Subsequent acts, however, (as sufficiently appears from the title and first section of 57 Geo. III. c. 127,) extended this



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percentage to other acquisitions not prize of war, specifying "all grants made to the royal navy or marines, all bounty moneys, seizures under the revenue, colonial, navigation, slave abolition acts, and also all droits of admiralty whatever which shall be distributable to or among the officers and crews of H. M. ships."

Thus every acquisition which shall be distributable to the officers and crews of H. M. ships and to marines is made subject to a percentage; and prize agents being the only persons authorized to make distribution, it may be much doubted whether acquisitions, which are to be distributed in any way among officers and seamen, are not in the first instance acquired for the crown. Whether then an agent could compromise and give up any rights of this kind without consent, express or implied, on the part of the crown, is also much to be doubted; it was stated in argument that they might; but I know of no authority to that extent; and the court does not acquiesce in the remark; indeed a doubt may exist whether in salvage effected by the servants of the crown, and in its pay, and on board its ships, the crown might not step in and claim the salvage and its appropriation for public purposes; but a consideration of this point is unnecessary in the decision of the present question.

Looking, then, to these statutes, and to the very words of the 57 Geo. III. c. 127, I can scarcely conceive any acquisition, beyond mere pay, which is distributable among the officers and [ \* 234 ] \* crew of a ship in H. M. service, that it was not the intention of the legislature to make liable to this contribution — to the support of Greenwich Hospital. There is one single instance in which the percentage has not been paid, and that is the Genoa case,<sup>1</sup> which was cited. That was a capture of booty; and it may be rather doubted whether booty is not in some manner prize; but that case does not apply; it was in 1814, before the 57 Geo. III.; and if it could be held to apply, it can hardly be imagined that even booty would not be now subject to the percentage, because it passes as grant.

The second clause of the 57 Geo. III., which I have read, extends in words to the present case. It is true that the term "prize agent" is there used; and possibly he might have been more correctly described "agent for distribution;" but it is quite evident that the term "prize agent" is not now limited to an agent for prize of war, but extends to any distribution among officers and crew. In the Prize Act of 1793, the mode of appointing an

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<sup>1</sup> 2 Dod. 444; and see "Booty in Peninsula." 1 Hagg. Ad. R. 39.

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agent for the distribution and management of prize is regulated; in the Prize Act of 1803, the same mode is again enacted and further regulated; and as other acquisitions were to be distributed, the acts still went on in describing agents for distribution merely as prize agents. It so happens that this second clause extends to acquisitions not expressly mentioned in the first, in much the same manner as, in 10 Geo. IV., the 22d clause extends the 17th, to which I will presently refer. Here in the first clause there is no mention of derelicts; but in the second, it is enacted in respect "of all [ \* 235 ] moneys arising from derelicts and of all grants." Now derelicts are *primâ facie* droits; they are so till a claim is allowed; they do not become actual droits until a year has expired without such a claim, and until then they are only derelicts. This treasure, though it never became a droit, was a derelict; it was out of the possession of any person in right of the owner—it was at the bottom of the sea and fished up from it; and there was no doubt in the mind of any one who sat in the court of appeal that it was a derelict; but within the time prescribed by law, the owners or their representatives appeared and claimed the property, and upon proof of ownership it was restored to them—but subject to salvage, and the salvage is in respect of moneys arising out of derelict.

Upon the true construction and meaning of 57 Geo. III. (without referring to 10 Geo. IV.) there appears then to me no doubt, that the percentage is due to Greenwich Hospital, as well as in regard to forfeited and unclaimed shares as moneys arising from derelict—that is, as salvage. If there could be any doubt, it would be removed by 10 Geo. IV. c. 26. The title of this act is "to transfer the management of Greenwich out-pensions, and certain duties in matters of prize, to the Treasurer of the Navy;" and the preamble is to the same effect; but they do not limit the enacting part; and it is clear that the act, in its clauses, is not confined to matters of prize. For instance, the 17th section enacts "that all forfeited and unclaimed shares and balances of prize money, and a percentage of 5*l*. in every 100*l*. out of the \* proceeds of all prizes, and out of all grants [ \* 236 ] to the royal navy and marines, and out of all bounty moneys, and all seizures under the revenue, colonial, navigation, and slave abolition laws, and out of all droits of admiralty, and out of all moneys arising from derelicts, shall continue to be paid, and be payable to the Treasurer of the Navy;" using therefore the same terms as 57 Geo. III., and expressly specifying "out of moneys arising from derelicts." This section applies only to a continuation of former regulations in regard to a percentage, so that I cannot agree to the remark, that if the clause had been intended to extend to "civil

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salvage," it would have been here introduced: such an enactment was not here necessary; the words, "moneys arising from derelict," were sufficient to extend to cases in which civil salvage arose from derelicts: but the 22d section embraces all other civil salvage; <sup>[ \* 237 ]</sup> and piratical seizures are here newly introduced; and the clause corresponds to s. 2 of 57 Geo. III., and to the former statutes in enacting, that the percentage is "to be retained by prize agents."

Is no force then to be given to the words, "civil salvage," in this clause? I cannot think that they were uselessly introduced; for there might be a "civil salvage," to which the words previously used would not strictly extend — such as arises from assistance to vessels of which the possession had not been abandoned — that would be a "civil salvage," but not "money arising from derelict." Every sum of money arising from derelict is a civil salvage, though every civil salvage does not necessarily arise from derelict. If the treasure recovered from *The Thetis* were not derelict; if it were never out of possession; if it were only saved from a vessel in distress, still it would be a civil salvage within this 22d clause. No doubt in my mind exists either as to the intention of the legislature, or the construction of these statutes; and I am of opinion that the percentage is due to Greenwich Hospital, even under 57 Geo. III., as money arising from derelict; and that if on that point there could be a doubt, it is removed by the 10 Geo. IV. The court therefore pronounces for the percentage, and dismisses the treasurer of the navy from any further appearance to the monition.

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<sup>1</sup> "And be it enacted, That all and every prize agent and prize agents shall, from and out of the net proceeds of all naval prize and bounty money, head money, grant, and other allowance of money in the nature thereof, to which the officers or crews of any of his Majesty's vessels, or any commissioned officer, warrant officer, petty officer, private seaman or marine, supernumerary or boy, or other person shall be entitled, and from and out of all bounty moneys, piratical seizures, and seizures under the revenue, colonial, navigation, or slave abolition laws, and from and out of all civil salvage, and vessels derelict, and moneys arising therefrom, and also from and out of all naval captures whatsoever, and from and out of all other naval proceeds or produce in the nature of prize or grant, to which the Royal Hospital for Seamen at Greenwich, or the Corporation of Greenwich Hospital, or the treasurer thereof, by any act or law or custom whatsoever, has been heretofore entitled, retain for the treasurer of his Majesty's navy for the time being, for the purposes of this act, and shall within ten days next after the account of the said moneys shall have been examined and certified by the examiner of naval prize accounts, or if there should be no such officer, then within ten days from the notification of any distribution of the said moneys, pay into the Bank of England, to the prize account of the said treasurer of the navy, the sum of five pounds per centum on the nett proceeds of every such prize, grant, or other moneys." S. 22.

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The Margaret. 3 Hagg.

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\* MARGARET, Nunn.

[ \* 238 ]

June 9, 1835.

Wages. A warrant of arrest at the instance of foreign seamen, shipped at Ancona by the master, who stipulated to procure them a passage back with wages; decreed against the freight and the master, the ship being gone and the claims of the men admitted; and upon the return of the ship to England, held also, (the claims being unsettled,) that the ship was liable for the whole demand — wages and costs.

On 31st May, 1834, the above ship being at Ancona, the master hired four Italian seamen, at 2*l.* 5*s.* each, per month, and, in the presence of the British consul there, entered into a written contract, that on the arrival of the ship in England they should continue on board, or that he would procure them a ship back to the Mediterranean with wages. The ship arrived at Chatham on the 5th of September, and the men continued on duty, on board, until the 5th of October, when they were discharged, and desired to apply to Mr. Peter Sanders of Mark Lane, agent of the owners, for their wages. On the 22d the agent paid them their wages to the 2d of October, and a further sum of 2*l.* 0*s.* 6*d.* among them on account of their maintenance, at the rate of 1*s.* 8*d.* per diem, subsequent to that day.

The ship sailed; the master was insolvent; the men were left, destitute, in England: and the agent, admitting their claims, declared that he had paid away all the freight. The men applied to the Sardinian consul: and the court, on the 21st of November, decreed — upon the affidavit of the seamen and an authenticated copy of the contract — a warrant to issue against the freight in his hands, and also against the master; but directed the warrant to be served, in the first instance, on the agent only. A warrant was served upon the agent; but he gave no appearance: the action therefore proceeded *in pœnam*: and after the four defaults had been granted, the agent, (who admitted that he had received the freight, \* but paid it away,) to avoid further costs, and in the [ \* 239 ] expectation that the ship would soon be in England, and in his charge as consignee, gave his bill at three months date, for 55*l.* — debt and costs — whereupon the matter was alleged to be under treaty. The ship arrived in England, but consigned to Messrs. Stewart & Westmoreland, of London. They admitted the claim of the seamen against the ship, but refused to pay the costs. Upon this, an action was, on the 2d May, entered against the ship; and, on the part of the owners, 38*l.* 14*s.* — the amount of wages and allowances claimed — were paid into the registry, with an undertaking to

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pay such costs as might be decreed against them. The facts were then set forth on behalf of the seamen, in an act on petition; and, in reply, it was admitted that the amount of the demand, for which the former action was brought against the freight, and for which the second action had been entered against the ship, was paid into the registry, as the ship was liable for the same, although she did not continue the property of the persons to whom she belonged when the debt to the said seamen was contracted, or when the freight was earned, or the former action pending; but it was denied that the ship was liable for the costs of such action, inasmuch as it should have been proceeded with, or the former agent sued upon his bill.

An affidavit, with a letter, dated 16 April, 1835, from Mr. Sanders to the Sardinian consul, was brought in, giving notice to him of the ship being in England, and that having accepted the bill, [ \* 240 ] merely as guaranty, he was only liable in the event of the men not recovering against the ship. There was no proof of the change of ownership.

*Addams*, for mariners.

*Nicholl*, *contra*.

SIR J. NICHOLL. It is said that the agent admits that he had possession of the freight, but it was out of his possession before the commencement of this suit; and he only undertook to pay the demand in case the ship were consigned to him. It is also said, that this is a new suit; but I do not so consider it; it is only a continuance of proceedings for the same object—the recovery of wages. The ship is liable for wages and costs. The costs are as much due as the *sors principalis*. If the ship has changed her owners, this payment may be hard upon those who are the present owners, but they must seek their remedy against the former owners.

Payment of costs decreed.

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The Protector. 3 Hagg.

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## \* PROTECTOR, Bragg.

June 26, 1835.

Wages. In an action by B. a motion that G. (who had a similar action to abide B.'s, and who was a witness for B.) might give in his answers to the defensive — allegation rejected. On the merits, the owner having permitted the answers to be taken and used against him as evidence, a tender pronounced for with costs.

ACTION against the above ship, at the suit of Isaac Brown, for wages, at 2*l.* per month, on her return voyage from Van Diemen's Land. In the articles a mark was opposite to his name as standing at 5*s.* per month. A tender of 1*l.* 0*s.* 6*d.* — the amount due at that rate — was made and refused. A summary petition was then admitted, and upon it George Gibbons, who had a similar action, agreed to be decided by Brown's, examined and cross-examined. They had both been convicts. \* A defensive [ \* 241 ] allegation, on the part of the master — the principal owner — was admitted, and Brown's answers given. The *King's Advocate* now moved, that Gibbons might also be permitted to file his answers to the allegation. *Addams* opposed the motion.

SIR J. NICHOLL. It is quite obvious that the present application is irregular. The party whose answers are required has not even been served with a decree for that purpose; and he is a witness in the cause. If, however, the owners will allow Gibbons's answers to be given in, it may prevent a responsive plea and his examination upon it, and thus facilitate the hearing of the cause. I must reject the motion.

Motion rejected.

Publication was then decreed, the cause assigned for sentence, and Gibbons's answers filed; and the result was a simple question of fact, whether Brown was hired as a seaman, at the usual rate of wages, or whether he was taken on board to work his passage home.

3d July. SIR J. NICHOLL, after hearing the *King's Advocate* for the mariner, and *Addams* — who admitted both answers to be taken as evidence — for the owner, was of opinion, first, that the owner had not proved a binding written contract; secondly, that the mariner had neither proved an agreement nor even a *quantum meruit*; and he pronounced for the tender, with costs.

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The Queen Mab. 3 Hagg.

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[ \* 242 ]

\* QUEEN MAB, Tallman.

July 3, 1835.

**Derelict.** After restitution to the owners, the ship was sold; and of 250*l.*, net proceeds, two fifths — in a case of considerable merit, lasting twenty hours — were given to principal salvors, twenty-four in number; and, out of the remainder, 30*l.* to a smack, for saving the ship's crew, 5*l.* to a cutter, for putting an anchor and cable on board, besides all costs and expenses.

THIS American vessel, in ballast from Rotterdam to America, got upon the Barrow Sand, and was, about five A. M. of 30th April, found a derelict in the South Channel by The Unity, a yawl, and The Ranger, a smack. She was dismasted, and without a rudder. They took her in tow, and while so engaged the master of The Beulah smack informed them that he had landed the master and crew of the vessel (eleven in number) at Sheerness, and offered his assistance. It was declined. About eleven A. M. a revenue cutter examined the vessel, and offered to assist in towing her into Sheerness. This offer was also declined; but her crew said it was their duty to continue on board, and the cutter towed ahead of The Ranger. At two P. M. a Trinity pilot took her in charge, and brought her to an anchor at the Little Nore. While there, the pilot requested to have an anchor and cable on board, and the cutter put them on board, her crew assisting at the pumps, there being between four and five feet water in her hold. In the mean time the master of the vessel and Mr. Edgcombe, the agent, came on board, and having returned on shore and obtained permission from the port admiral to put the vessel into the admiral's basin, near the dock-yard at Sheerness, she was there made fast at about half-past twelve A. M.

An action having been entered against the ship, as derelict, a claim was given for the owners by the master, and allowed. An appearance was then entered for the salvors; and at their joint [ \* 243 ] petition \* the ship was sold, and 250*l.* — net proceeds — paid into the registry.

The act on petition, in reference to the claim of The Beulah, set forth the 1 & 2 Geo. IV. c. 75, s. 8, which enacts that salvage may be awarded "for being instrumental in saving the life or lives of any person or persons on board," and it was also alleged that one of the boats of The Beulah was staved, and her jib-sail spoilt in taking off the crew.

*King's Advocate*, for the salvors.

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The Baron Holberg. 3 Hagg.

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*Addams, contra.*

SIR J. NICHOLL. This is a proceeding for salvage to a derelict, and where considerable skill and management have been shown. The vessels, *Unity* and *Ranger*, are the principal, and perhaps, in strictness, the only salvors; they had possession, were able to bring the vessel in, and they rejected repeated offers of assistance; and I have had occasion to observe in other salvage cases, that, unless a necessity is shown for further assistance, no party, other than the first in possession, has a right to interfere.<sup>1</sup> The cutter was rather an intruder. The crew were told their assistance was not wanted; and going on board for the protection of the revenue will not make them salvors. They, however, at the pilot's suggestion, put on board a cable and anchor; and though they were not used, and were taken back by them on the next day, it is always desirable to encourage due assistance, and I shall therefore award some small remuneration \* for this trouble. So, again, the services of The [\* 244] *Beulah* were not accepted, whatever her claim may be on another ground. The property is only 250*l.*, and I allot out of it 100*l.* to The *Unity* and *Ranger* — that is two fifths, or rather more than a moiety, if the expenses are first deducted; the costs and expenses are to be next deducted; and I then give 30*l.* to The *Beulah*, for her assistance in preserving the lives of the crew, and her charges and expenses, and 5*l.* to the cutter, for putting on board the anchor and cable.

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BARON HOLBERG, Blom.

November 5, 1835.

Collision. A foreign ship, in charge of a licensed pilot, and her course free, ran down a barge beating up the river with a westerly wind, held liable for the damage and costs.

ACTION by the owner of a barge run down off Woolwich by a foreign vessel in charge of a licensed pilot.

*Addams*, for the owner of the barge, admitted, in reference to her value, that in the act on petition it was over estimated at 165*l.*, as in 1832 she only cost 125*l.*

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<sup>1</sup> See Eugene, *supra*, 160; Effort, *supra*, 165.



*Nicholl, contrà*, said it was not his intention, after the decision in *The Girolamo*, (p. 169,) to argue that the fact of a licensed pilot in charge would relieve the owners of a foreign ship from an action *in rem*; but he contended that they were entitled to a presumption, supported here by evidence, that their vessel—with a master of thirty, and a pilot of eight years' experience—was skilfully managed, while the barge had only two watermen on board.

[ \* 245 ] \* SIR J. NICHOLL. There is no doubt on the material facts.

The Baron Holberg, a ship of 500 tons, in ballast, was going down the river with a westerly wind and in open daylight, while the barge, heavily laden with chalk, was beating up with the assistance of the tide, and against an adverse wind. The Baron Holberg had, therefore, I conceive, complete command of her course; and the rule was then clear, that a vessel with a free course must give way to a vessel beating up to windward and tacking. The *onus* is, under such circumstances, upon The Baron Holberg to show that all possible skill was used on her part, and that the collision arose from fault in the barge, or that it was unavoidable. These cases frequently turn on conflicting affidavits—each charging the other with blame—and the pilot, perhaps, may in this case have made an affidavit rather in exoneration of himself; because if the vessel, in his charge, be in fault, the owners may have an action against him; but in this court the remedy is against the ship. Looking, then, to facts not in dispute, to the conduct of the parties, to the reason of the thing, what each could do, is it likely that this barge would designedly, or even negligently, have put herself in the way of a vessel of 500 tons? The men on board the barge might not be very skilful, but they would do their best to avoid such a vessel. Whether the collision happened from fault in the pilot, or from any other cause on board this ship, her owners have failed to make out a case of exoneration, and I pronounce for the damage and costs. As the parties are not agreed

upon the value of the barge, I must refer that to the registrar and merchants. [ \* 246 ] \* The act on petition puts the value of the barge higher, certainly, than what the bills of sale justify; the amount, however, is so small, that it will be desirable to arrange this matter without the expense of a reference.

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The Marquis of Huntly. 3 Hagg.

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## MARQUIS OF HUNTLY, Molisson.

November 13, 1835.

A ship, with government stores, was preserved by thirty-two salvors, at great risk to all, and with loss of life to three, besides damage to and loss of boats. The owners of the ship, estimating her at 1,500*l.* tendered 400*l.* as salvage for the ship and freight. The stores were valued at about 5,000*l.* The court, adopting the tender, gave 900*l.* in addition for the stores, making together a salvage of about one fifth, and apportioned this sum among the surviving salvors and the families of those who perished. Costs *pro ratâ* between the ship and cargo.

This ship, of 564 tons, twenty-eight men, and five boys, chartered by government, and having on board eleven invalid soldiers, Lieutenant Saunders, the government agent, in charge of naval and ordnance stores, while on her voyage from Leith to London, got on the Middle Sand, off Essex, about noon of the 10th of November, 1834, the weathy thick and rainy, tide ebbing, the wind at E. N. E., the vessel's head to the N. W., and her fore-yard carried away. She hoisted a signal of distress, and eight Colchester smacks, with thirty-two men, on the look-out in the Swin, went to her assistance. In boarding, by means of their boats, both boats and crews were in danger, from the surf and breakers; the master of The Bachelor was washed out of his boat, but was saved; so was a boy, after being in the water twenty minutes. But Cook, the master of The Prosperous, his brother, and another seaman, in returning to a smack to go to Sheerness, to obtain a government steamer, by desire of the agent, were lost. Three boats were also sunk; and before the weather moderated, all the crew, excepting Lieutenant Saunders and the master, declared they would not stay by the ship all night, and guns were fired to have the smacks near. When the salvors got on board, the vessel was beating upon the sand; forty tons [ \* 247 ] of her cargo were then thrown overboard, and all other proper means taken to get her off; and in the next tide, about six P. M., she was got into deep water, anchored for the night; and on the following morning, pumping only being required, the salvors quitted, except two who came up with the vessel to Gravesend, where she arrived about four P. M.

An action having been entered against the ship, cargo, and freight, an appearance was given for the ship and freight, and bail for them in 1,000*l.*, and a tender of 400*l.* The value of the ship was stated by the owners to be 1,500*l.*; but the salvors allowing 500*l.* for repairs, put the value at 2,500*l.*; as she was insured before the voyage for

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The Marquis of Huntly. 3 Hagg.

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3,000*l*. She was chartered by government at the rate of 12*l*. per ton per calendar month.

The case was ready for hearing on the 29th of May, when the court, having ascertained that no salvage had been paid on the stores, nor even any account furnished of their value, expressed its opinion that in a case of such great merit, and where three lives had been lost, there ought to be a remuneration in respect of the stores, and directed the case to stand over that the matter might be represented to the admiralty.

On this day the *King's Advocate* — after stating the value of the ordnance stores to be 2,835*l*.; and *Phillimore* — for the Lords of the Admiralty — that the naval stores amounted to 2,112*l*., together being 4,947*l*., and that the government was anxious that the salvors should be rewarded liberally, left the amount of that reward to the judgment of the court.

[ \* 248 ] \* The cause was then argued by *Burnaby* for the salvors, and *Addams* and *Nicholl* *contra*.

SIR J. NICHOLL. After detailing the salvage service. In regard to the value of the smacks, each smack is stated to be worth 200*l*., and that they cannot be insured on account of the risks they encounter. The ship was insured for this very voyage at 3,000*l*.; can it then be said that the damage she received was such as to reduce her value one half? If so, it is evidence of the danger in which she was at the time of these services; but taking her value at 1,500*l*., the tender admits about one fourth as a proper remuneration. Taking also the value of the cargo at nearly 5,000*l*., what is the sum to be allotted? The court does not think that government should reward less liberally than private individuals; indeed, on grounds of public policy, they should rather give more. The stores are the property of the public, although called his Majesty's stores; and I am not inclined to take a more narrow view of the salvage upon them than the owners have done with respect to the ship and freight. In *The Sarah*,<sup>1</sup> Lord Stowell said, "I do not think that the exact service performed is the only proper test for the *quantum* of reward; the general interest and security of navigation is a point to which the court will likewise look." In that case private interests only were concerned. Again, in *The William Beckford*,<sup>2</sup> a case of more importance, because it was

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<sup>1</sup> 1 Rob. 313, *in notis*.

<sup>2</sup> 3 Rob. 355.

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The Adolph. 3 Hagg.

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appealed to the \*delegates, the same learned judge held, [\*249] that "the principles, on which the Court of Admiralty proceeds, lead to a liberal remuneration in salvage cases; for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interest of the navigation and commerce of the country." As in that case so in this, not a shilling of property would have been saved but for the meritorious exertions of salvors. In neither of those cases was there personal risk; here human life has been lost. Under all the circumstances, I direct 900*l.* as salvage for the public stores in addition to the sum tendered, which will make together 1,300—about one fifth of the whole value. Of that sum I allot 150*l.* to each of the eight smacks, and 100*l.* to the families or the representatives. Of those whose lives were lost; 50*l.* being given as for Cook—the master, and 25*l.* each for the two men. Had the crew quitted the vessel and she had become derelict, two fifths would have been the least reward. The costs must be paid *pro rata* in equal proportions to the property saved.

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ADOLPH, Schneider.

November 27, 1835.

Motion—that a bondholder, in a suit *in pœnam* against a foreign ship, may pay wages of crew and deduct the same from proceeds of sale—rejected.

THIS was a proceeding in a cause of bottomry against a Hamburg ship, and the fourth default having been granted, the *King's Advocate*, on an affidavit of the mate and one seaman as to their wages and expenses of returning home, (about 20*l.* altogether,) for which they threatened to \*arrest the ship, moved that the bond- [\*250] holder might pay them and have a priority in deducting the amount from the proceeds of the ship. He cited *The Kammerhevie*, 1 Hagg. A. R. 62.

SIR J. NICHOLL. In that case there was the certificate of the consul, and the master gave his consent; here there is no one to consent. I cannot make any order.

Motion rejected.

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The St. Catherine. 3 Hagg.

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## ST. CATHERINE, Sinclair.

November 18, 1835.

A bottomry bond, — dated 26th November, just before the vessel sailed, given at Miramichi, with twenty per cent. interest, to consignees of charterers — (they having been directed by the charterers to “value upon the owner” for a reimbursement of other than trivial payments,) — sustained; it being held that the bond was originally contemplated, that bills of exchange did not affect it, and that the owner's bankruptcy was not known at the date of the bond.

BOTTOMRY bond. The want of repairs and the execution of the bond being admitted, *Addams*, for the assignee, was heard in opposition to the bond; and the *King's Advocate* and *Haggard*, in support of it.

SIR J. NICHOLL. This is a suit to recover the amount of a bottomry bond, brought by Willis & Co., agents of J. & P. Williston, of Miramichi, against the vessel St. Catherine, and her freight. An appearance has been given by the assignee of William Austin Grocock, the late owner. The bond is for 899*l.*, and twenty per cent. maritime interest; it is dated 26th of November, 1834 — the day before the vessel sailed; it is executed in triplicate, and attested. Nothing arises on the face or form of this bond which affects its validity; but there are facts and dates which are material.

[ \* 251 ] \* On the 1st of September this vessel, the property of Grocock, was chartered at Liverpool to Willis & Swainson, for J. & P. Williston, on a voyage from Liverpool to Miramichi, to bring back a cargo of timber. Sinclair was put in command as master, with the knowledge and approbation of the owner; and a letter of instructions of the 6th of September, from the charterers to Sinclair, directs him, on his arrival at Miramichi, to apply to J. & P. Williston, who would give him all despatch, and also pay the necessary expenses on the bills to be sent to them; and which they expect will not exceed from 35*l.* to 45*l.* It informed him that the vessel was insured at New York, and inclosed a copy of the charter-party. The charterers also sent a letter of advice of the same date to Messrs. Williston, directing them to watch the conduct of the master, that he is not to have much for disbursements, and that he is to pay the bills through them, and “for your reimbursements you will value on W. A. Grocock, London.” Thus commenced this transaction. The vessel sailed on the 7th of September, and in October met with most

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The *St. Catharine*. 3 Hagg.

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tempestuous weather; she was dismasted, but reached Miramichi on the 23d of October.

On the arrival of the vessel at Miramichi, Sinclair applied to Messrs. Williston and noted his protest. The vessel was then, very properly, surveyed; considerable repairs recommended, and despatch was necessary to save the winter. The repairs were completed towards the latter end of November; the bills were paid by J. & P. Williston; the vouchers are exhibited, and their account \* seems very full and unexceptionable; nor is it immaterial [ \* 252 ] to observe that it is not made out against Willis & Swainson, but is entitled "owners of brig *St. Catherine*, and all concerned, to J. & P. Williston;" it is signed on the 26th of November. The bottomry bond and bills of exchange bear date on that day, and also the letter they sent to Willis & Swainson, inclosing one bond and one bill for 809*l*. 15*s*. on Grocock, with directions, if they can obtain thorough security for the bond to accept it, but otherwise to enforce the bond.

The vessel finally sailed on the 28th of November,<sup>1</sup> and arrived safely at Liverpool; and the bond is now opposed on various grounds. First, it is said, that the advances were made not on the credit of the ship or owner, but on the credit of Willis & Swainson; but the fact is clearly otherwise; and the letter of advice, of the 6th of September, instructs Messrs. Williston that even for small ordinary disbursements they were to draw upon the owner. Secondly, it is said, that the bond was an afterthought — that the ship was under weigh before it was suggested; but that account of the matter is very improbable, and it is contradicted and disproved. Thirdly, it is said, that it was not contemplated till some rumors had reached Miramichi to the discredit of the owner, and there has been an attempt to show that his actual bankruptcy was known; but I am not prepared to say, that even if the bankruptcy had been known to Messrs. Williston \* on the 26th of September, that would take away [ \* 253 ] the effect of a bottomry bond given by a master in a foreign port, where the merchant who had made advances on the credit of the ship might perhaps detain her till he was repaid and his lien discharged. Assignees are, I apprehend, in no better situation in opposing a bond of this nature, than owners, if there were no bankruptcy. But that there was any such knowledge is disproved and contradicted; a bottomry bond was always contemplated; and it was prepared for execution some days before the account was settled. The Messrs.

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<sup>1</sup> She set sail on the 27th, but was detained by running aground.

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The Albion. 3 Hagg.

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Willistons were instructed even for 35*l.* or 45*l.* to draw on Grocock ; they however had no knowledge of him nor of the master ; Sinclair was a new master, and no confidence was placed in him as to disbursements. Willis & Swainson, as charterers, might guarantee small payments to the extent mentioned in their letter, but they would not stand guarantee to the owner for upwards of 800*l.* Such advances could only be on the credit of the ship, and the bills of exchange serve as a collateral security ; it is a common practice to take them, and have been often held not to vitiate a bottomry bond.<sup>1</sup> I think the conduct of the master in sanctioning the opposition to this bond serves rather to his discredit, while, on the other hand, the conduct of the bondholders marks the whole of this transaction as fair and liberal ; and where a transaction is so conducted in a distant part of the world, and no advantage taken of distress, it is highly for [\* 254 ] the \*interests of commerce to sustain the credit of these bonds ; the foreign lender is entitled to the best security.

The court pronounced for the bond, and condemned the assignee and the bail in the amount and in costs ; and also in interest at and after the rate of four per cent. from the time the bond became due until the same should be paid.

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ALBION, Turnbull.<sup>2</sup>

April 18, 1837.

**Salvage.** Out of a value of 4,600*l.*, 1,000*l.* given for services of a fishing smack to a dismasted vessel brought into port after five days towing ; and 100*l.* to a second smack, with the expenses.

Apportionment of salvage among owner, master, and crew.

**SALVAGE.** The act on petition stated, that The Harlequin, a fishing smack of 57 tons — a master, four men, and three boys — being at sea off Brown Bank, forty-five miles from Lowestoff, discovered, at four, P. M., of the 14th of December, a dismasted vessel about seven miles distant, the wind — W. by S. — blowing heavily, with squalls ; the smack made the vessel about five, and (not being able

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<sup>1</sup> Jane, 1 Dod. 466. Tartar, 1 Hagg. A. R. 1. Nelson, ib. 179. And *supra*, pp. 1, 13.

<sup>2</sup> The cases, in 1836, will be printed in the next part.

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The Albion. 3 Hagg.

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to put out a boat) ran under her stern, ascertaining, by means of a speaking trumpet, she was The Albion schooner of Leith, with a general cargo from Rotterdam, and agreed to stay by her — each to carry lights; that in the night it snowed heavily; and at daylight of the 15th the schooner had drifted towards the coast of Holland, the wind N. W. by N.; and that after much difficulty she was taken in tow, and at nine, A. M., The Bradshaw, another fishing smack, of 50 tons, came up, and assisted in towing ahead of The Harlequin until two, A. M., of the 16th, when The Bradshaw sailed away — returned about noon — could not, from \* violence of weather, [ \* 255 ] get a rope on board, and finally quitted at three:<sup>1</sup> on the 17th the weather moderated; a jury mast and rigging, and lanterns for night signals, were put on board from The Harlequin, and on the 19th, (the towing having continued except at night,) the schooner being in Yarmouth harbor, the smack quitted — having been in great peril during the whole service, and was much strained. The owners of the smacks claimed salvage. The value was about 4,600*l.*; the tender, 400*l.*

*King's Advocate* and *Addams*, for The Harlequin.

*Burnaby*, for The Bradshaw.

*Haggard* and *Jenner*, for the owners of The Albion.

SIR J. NICHOLL. After observing upon the facts — that it was a case where a meritorious service had been performed, and was in some respects of more importance than a derelict, for the lives in the schooner were in imminent peril; — said, it is not necessary to enter into a minute detail; but a more complete rescue from total loss can hardly be described: it has been effected by great perseverance and skill, and it occupied five days. If it had been a derelict, one third at least would have been given. I shall award to The Harlequin 1,000*l.*: and in respect of The Bradshaw, she is entitled to some remuneration: she has the merit of going to assist — she showed a willingness, and her offer of assistance was accepted; but it is clear that she \*impeded the progress of the service. [ \* 256 ] Considering that a fourth is not too large a salvage in this

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<sup>1</sup> The Bradshaw had a cargo of fish; it was in dispute whether she voluntarily abandoned or was cut adrift, but it was proved that she sailed badly, and impeded the towing.



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The King v. 49 Casks of Brandy. 3 Hag.

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case, I give 100*l*. to The Bradshaw; and, as the tender is wholly inadequate, with all the expenses.

An application was then made for a specific apportionment to the owner of The Harlequin.

SIR J. NICHOLL. There is no precise rule in such a matter. All apportionment of salvage for services by a fishing smack is a different case from where the services have been rendered by a steam-vessel.<sup>1</sup> If, however, the counsel can agree upon a scheme of apportionment of the whole salvage, I will make it a rule of court.

The order of court was as follows :

Owner of Harlequin $\frac{1}{30}$ ths, <sup>2</sup>	350 <i>l</i> .
Master,	230
Mate,	120
Three seamen, 90 <i>l</i> . each,	270
Three boys, 10 <i>l</i> . each,	30
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	1,000 <i>l</i> . <sup>3</sup>

The 100*l*., awarded to The Bradshaw, was divided in the same proportion.

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[ \*257 ] \* THE KING (in his office of admiralty) v. FORTY-NINE  
CASKS OF BRANDY.<sup>4</sup>

January 20, 1836.

Effect, as against the office of Admiralty, of grants from the crown to a lord of a manor of "wreck of the sea." Claim, by grant, to "flotsam," &c. &c., not exceeding three miles from low water mark, rejected. Boundaries of the admiralty jurisdiction on the coasts of the kingdom. Office of Lord High Admiral, its duties, and rights. To constitute "wreck of the sea," goods must have touched the ground, though they need not

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<sup>1</sup> In *The Howard* — 28 June, 1836 — the court, out of 2,000*l*., gave 1,000*l*. to the owners of a steamer; 500*l*. to the master, and the remaining 500*l*. in 21 shares, according to the respective wages.

<sup>2</sup> Her value was stated to be 1,200*l*., and that being licensed for fishing and salvage, she was only insurable at a very high rate.

<sup>3</sup> In the *Defiance* — 7 June, 1837 — a similar apportionment of 1,000*l*. salvage was made to a schooner.

<sup>4</sup> [As to wrecks, see the next case, and *The Pauline*, 2 W. Rob. 358.]

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The King v. 49 Casks of Brandy. 3 Hagg.

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have been left dry. Goods afloat on the high sea (though within low-water mark) if they have not touched the ground, are "droits." If they have touched the ground, but are still moved by the sea, *quere*. *Semble*, that the crown cannot lawfully grant "droits" to a private person.

Rule of construction of grants from the crown.

Three miles beyond low-water mark is the limit of territorial right as between nations only.

His Majesty's proctor, in his office of admiralty, having entered an action against the above casks of brandy, as taken and seized upon the high seas, and brought to or near Poole, in the county of Dorset, and being goods derelict, flotsam, jetsam, or ligan, and as such, rights and perquisites of the king, in his office of admiralty, the warrant of arrest was returned, and an appearance given for William John Bankes, Esq., sole executor of, and residuary legatee in, the will of Henry Bankes, Esq., deceased; whilst living the person entitled to the rights of admiralty and wreck in the parts where the casks of brandy were found. Affidavits were then exhibited by the admiralty proctor as to the perishable condition of the goods, and a commission of appraisement and sale was consented to and decreed; and the cause finally was heard upon an act on petition, and affidavits on both sides, and also verified copies of ancient grants and other documents.

The act on petition, in support of Mr. Bankes' title and claim, began by setting forth: "That by virtue of a commission, issued by King Richard the Second, in the 4th year of his reign, to inquire 'what and what manner of possessions, rents, rights, customs, and liberties, or other things did anciently and then belong to the castle and lordship of Corfe,' (whereof the said king was then seised in his demesne as of fee,) an inquisition was held at Corfe Castle, and it was found, \* *inter alia*, that the whole Isle of Purbeck was the [ \* 258 ] warren of the king and pertained to his castle, and did extend from the path between the wood of Wyteway and Flouresberie, and thence as far as Luggesford, and from that as far as the bridge of Wareham, and so from the sea eastwards to the place called Stodland Castle, and thence all along the sea-coast as far as the chapel of St. Aldemas, and from that still along the sea-coast westwards until it reached again to the aforesaid place of Flouresberie; and that all pleas of vert and venison and also of wreck of the sea pertained to the castle aforesaid, and ought to be determined by the constable and his steward, whereof the ransoms pertained to the constable; and that the said constable had taken wreck of the sea throughout the whole of his bailiwick when it had happened from time out of mind even till then; and that the king had received from time, &c., all royal fishes, namely, grampus, porpus, and sturgeon, caught upon the

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coast aforesaid, and had prisage of wine of every ship freighted therewith and coming upon the sea-coast of Purbeck, if the same should land with anchor and cable. That by letters patent dated at Hampton Court, on the 15th of January, in the 32d year of the reign of

King Henry the VIII.;<sup>1</sup> the said king being then seised of [ \*259 ] the same in his demesne as of fee, gave and granted to his then consort, Queen Catherine, amongst other things, the hundreds of Rowborough and Hassilore, (now Hasler,) and which hundreds then comprehended and still comprehend the whole of the Isle of Purbeck, together with all their appurtenances and all the royalties, liberties, rights, privileges, and franchises named therein, comprising, among other things, all chattels called waife and straye, deodands, treasure found, and all other things and chattels found, wreck of the sea, flotzam, jetzon, or lagon, and royal fishes when they should happen to lie within the said hundreds or any parcel thereof, or their limits. That Queen Elizabeth, being at such time seised of the said lordship and castle in her demesne as of fee, did by letters patent in the 14th year of her reign, for herself, her heirs, &c., for the consideration therein named,<sup>2</sup> (amongst other things) give and grant to Christopher Hatton, Esquire, his heirs, &c., all her said castle of Corfe, otherwise Corfe Castle, in her said county of Dorset, with all its liberties, privileges, preëminences, commodities, royalties, and appurtenances, and all her lordship and manor of Corfe with all its rights, members, liberties, and appurtenances in the Isle of Purbeck; and also all manner of warrens, chases, liberties, privileges, franchises, royalties, wrecks of the sea, shipwrecks, and preëminences whatsoever to the said lordship, manor or castle of Corfe aforesaid belonging or in [ \*260 ] any manner appertaining or theretofore held, \*known, accepted, used, or reputed as parcel or member of the said lordship, manor, castle, and premises, or in any of them, or in any parcel thereof formerly used, occupied, or exercised, and all and every other right of her the said queen in and to the said lordship, &c., &c., and other the aforesaid premises, or in or within any parcel thereof hap-

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<sup>1</sup> By 31 Hen. VIII., the king was empowered to grant castles, honors, manors, &c., to any queen consort for the time being for life, by way of jointure. The patent recited was, in fact, dated on the 14th of January; but among the proofs there was also a patent of the 15th, whereby Queen Catherine had a grant of all the extensive rights and privileges, as set forth; and was further empowered during her life to appoint an admiral within the lordship, &c., of Corfe, with the same authorities within the same as the admiral of the king could have or exercise; and that their admirals of England and their lieutenants, &c., on production of the said letters patent should observe and obey the same.

<sup>2</sup> Viz. 4,761*l.* 18*s.* 7 1-2*d.*

pening or occurring, and all benefit and advantage to be had exercised and taken therefrom, to be by him the said C. H., his heirs, &c., forever, held and enjoyed as fully freely and entirely and in as ample a manner as Edward, late Duke of Somerset, or the said Queen Catherine; that by letters patent, dated respectively in the 18th and 27th years of the said reign, her Majesty Queen Elizabeth, for herself, her heirs, &c., confirmed the ancient boundaries of the lordship and manor of Corfe Castle and Isle of Purbeck, and granted to Sir Christopher Hatton, K. G., Lord Chancellor of England, his heirs, &c., forever, that the said castle, lordship, &c., and all places within the precincts and liberties of the same, as well by land as by water, should be exempt, separate, and private, and absolved forever from all power, jurisdiction, and official authority whatsoever of the admiral and admirals of her kingdom of England, her heirs, &c., and their lieutenants and servants whatsoever for the time being; and that no admiral of England of her Majesty, her heirs, &c., or his lieutenant, commissioner, officer, or deputy for the time being, or any admirals, nor the lieutenants, commissioners, servants, officers, or deputies of the same admiral or admirals of her Majesty, her heirs, &c., for the time being, should enter the castle, &c., &c., nor the precincts of \* any of them, neither [ \* 261 ] by land nor by water, for the purpose of inquiring into, exercising, doing, or executing within the said castle, &c., or the precincts of any of them, any thing which to the office of the admiralty did or might belong; but that the said castle, &c., and all places within the precincts and liberties of the same, as well by land as by water, should be altogether and forever beyond the power, jurisdiction, and authority of the said admiral and admirals, and his and their lieutenants, &c., and that no admiral nor any admirals of her Majesty, her heirs, &c., nor the lieutenants, &c., aforesaid, nor any or either of them should intermeddle within the said castle, &c., or the precincts or liberties of any of them by land or by water concerning any thing whatsoever which to the office of the admiralty in that behalf did or might belong: and her Majesty did moreover grant to the aforesaid Sir C. H., his heirs, &c., forever, that he and his heirs having and possessing the said castle and lordship of Corfe should be admirals within the said castle, lordship and manor of Corfe and Island of Purbeck, and the precincts and liberties of the same, as well by water as by land, and upon the high sea flowing to or adjoining the aforesaid island or any part thereof, and of and over all ports, creeks, rivers, arms of the sea and other waters and places whatsoever, being within the aforesaid island, and should do, exercise and execute before them, their bailiffs or deputies, within the castle, &c., and the

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precincts and liberties of the same, and upon the high sea, ports, creeks, rivers,<sup>a</sup> arms of the sea, waters, and places whatsoever above mentioned, those things which to the office of admiralty did [ \*262 ] \* or might belong, and her Majesty appointed the said Sir C. H., his heirs, &c., in all the same places, and thereby gave and granted to the said Sir C. H., his heirs, &c., forever, the office of the admiral and admiralty of and in all the same places, together with all forfeitures, profits, and advantages in the same places to the office of admiral in any manner belonging or appertaining, without any account to be made or rendered of the same to herself, her heirs, &c., so that the admiral of England of her Majesty, her heirs, &c., for the time being, or his lieutenant, should in no wise enter the said castle, &c., or the precincts and liberties of the same, or by land or by water, do or execute any thing there which to the office of the admiralty did or might belong, or should in any wise intrude themselves for that purpose within the said castle, &c.”

The act then alleged, “that by a judgment in the Exchequer, 16 Car. II., upon an information filed against Sir Ralph Bankes, the then proprietor of the said castle, &c., to show by what authority he exercised within the castle, &c., and precincts of the Isle of Purbeck the right to all wrecks of the sea and shipwrecks, and all royal fish, and to exercise the office of admiralty by land and on the high sea, &c., the said rights were confirmed to Sir Ralph Bankes;<sup>1</sup> and that

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<sup>1</sup> On a *quo warranto* information, filed by the Attorney-General against Sir Ralph Bankes, for using and exercising (amongst others) the rights and privileges following:—  
“To have, use, and enjoy within the castle, manor, and town of Corfe, in the isle of Purbeck, and in all other towns and places within the limits and precincts of the same island, the liberties, privileges, and franchises (*inter alia*) following, namely:—

“Chase and free warren and liberties of the same within the said island, and to appoint therein a constable of the said castle, and warreners; and to have and enjoy to his own use the prisage of wine of every ship freighted with wine, coming on the sea-coast of Purbeck, if it should stop and fix itself with cable and anchors; also wreck of the sea and shipwrecks through the whole bailiwick of the said island, and all royal fish, namely, porpoise, grampus, and sturgeon, taken on the said coast; and all falcons building and making their nests on the bailiwick aforesaid; and to exercise and execute before himself, his bailiffs and deputies within the castle, lordship, and manor of Corfe, and the precincts and liberties of the same, as well by water as by land, and upon the high sea flowing to or adjoining the said island or any part thereof; and within all ports, creeks, rivers, arms of the sea, waters, and places whatsoever within the said island, all and singular those things which to the office of admiralty belong, or may belong, for all debts, contracts, agreements, transgressions, frauds, and other things and offence whatsoever upon the sea or elsewhere made or committed, which within the said castle, &c., &c., can or ought in any manner be treated of or inquired into, heard, corrected, informed, or determined in matters of this nature; and to have and enjoy all forfeitures, profit, and advantages in the same places to the office of admiral in any manner belonging or

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\* the said castle, &c., and hundreds of Rowborough and Has- [\* 263 ]  
 ler, and rights, privileges, liberties, franchises, preëminences,  
 commodities, and royalties in the Isle of Purbeck or any \* part [\* 264 ]  
 or parcel thereof, or within their limits to be had or exer-  
 cised, as hereinbefore recited, became vested in Henry Bankes, Esq.,  
 and were so vested in him at his death ; that in February, 1834, fifty-five  
 casks of brandy were found and secured floating off, and four aground  
 upon, the Isle of Purbeck aforesaid, ten whereof, less one and a half  
 which burst, were conveyed to the custom-house at Weymouth ; and  
 forty-nine (less one also lost) to the custom-house at Poole, and which  
 last-mentioned casks have since been arrested in virtue of a warrant  
 issued out of this court as goods found derelict, &c. ; and it was alleged  
 that thirty-three of the forty-nine were taken up and secured floating  
 not exceeding three miles from the low-water mark, on different parts  
 of the coast of the said Isle of Purbeck, and that in virtue of the  
 premises hereinbefore recited such and so many of the said casks as  
 were so taken up and secured do not appertain or belong to the king  
 in right of his said office or otherwise, but appertain or belong to the  
 estate of the said H. Bankes ; and that ten other of the said casks  
 were either wreck of the sea or found and taken up between high and  
 low water mark, and by reason thereof were not subject to admiralty  
 jurisdiction ; but that if they or any or either of them were  
 \* subject thereto, yet that they were so found and taken up [\* 265 ]  
 within limits whereby in virtue of the premises they belong  
 to the said estate."

In reply, the admiralty proctor alleged that nineteen only of the  
 thirty-three casks were taken up at distances not exceeding three

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appertaining ; and to have cognizance by the bailiffs or deputies of him and his heirs  
 for the time being, of all and singular actions, suits, complaints and demands concern-  
 ing all debts, contracts, agreements, transgressions, frauds, and offences of this nature to  
 be heard and determined before the same bailiffs or deputies, so that the admiral of  
 England of the king, his heirs and successors for the time being, or his lieutenants, com-  
 missioners, officers, procurators or deputies for the time being, shall not by any means  
 enter the aforesaid castle, &c., &c., or any other place by land or by water to do or  
 execute any thing there which to the office of admiral belongs or may belong."

In support of his claim, Sir Ralph Bankes pleaded the inquisition of 4th Richard II.,  
 and letters patent of the 14th and 27th of Queen Elizabeth, and that he by good and  
 sufficient conveyance, &c., had become possessed of the estate and interest of Sir C.  
 Hatton in the liberties, franchises, &c., thereby granted. On the admission of the  
 Attorney-General, that the claim of Sir Ralph Bankes was well founded :—

The judgment of the court was given, " that the aforesaid liberties, and all the pro-  
 fits, commodities, and emoluments thence arising and to the same and each of them  
 belonging, should be allowed to Sir Ralph Bankes and his heirs."

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miles from low-water mark, and that the grant of flotzam &c., and royal fishes, in 32d Hen. VIII. is of such things only when they happen within the hundreds of Robarrow and Hasler, or the limits thereof; that neither the said hundreds, nor are flotzam, &c., granted in the letters patent of the 14th of Q. Eliz., and that those of the 18th and 27th of the said queen are not sufficient to pass goods derelict, flotzam, &c., but that if they were, yet that the boundaries, precincts, and limits of the said castle, &c., must be taken to be those found upon the inquisition, and that they do not extend over the sea or any part thereof; that by the grant to Sir C. H. to be admiral "upon the high sea flowing to or adjoining the said island," must be meant and understood the high sea flowing only between high and low-water mark; and there is no law, custom, or usage by which admiralty jurisdiction, being granted away by the crown without the extent of such jurisdiction being defined or expressed in terms of the grant, has been or can be held to extend three miles or any distance whatever from the low-water mark; that none of the casks proceeded against were wreck, for that none of such as were found and taken up between high and low-water mark were so found and taken up dry when the tide was out." It was also alleged, "that if the office of admiral and of the admiralty of and within the said castle, &c., and island [\* 266] of Purbeck, and on the high sea \*flowing and adjoining thereto hath ever been exercised, (which was denied,) yet that the same hath long since been disused, and that if any officers were ever appointed to execute the duties of such office, or any Court of Admiralty held for the said precincts, yet for a long time past no such officers have been appointed, nor any such court held; and that the alleged franchises, if any such were ever granted, have become forfeited in law together with all profits and advantages thereto belonging."

The rejoinder alleged, "that the grant of Hen. VIII. is not and could not have been intended to have been restricted to the said hundreds only, inasmuch as flotzam is generally if not always and at times of the tide necessarily must be, and lagon also may and frequently does occur beyond low-water mark and consequently not within the limits of the said hundreds (now comprising the whole of the Isle of Purbeck) are not mentioned in the letters patent of the 14th of Q. Eliz., yet that the said hundreds and all the rights and privileges contained in the grant of Hen. VIII. were legally and beneficially in the said H. Bankes; and that by the inquisition the boundaries by land are set forth chiefly with reference to the warren, which belonged to the king, in the common form of perambulation, and not with reference particularly to the rights and privileges he possessed

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and was entitled to over the adjoining sea; and that the said letters patent by Q. Eliz., in addition to certain privileges appertaining to the land, expressly granted admiralty jurisdiction over the high seas adjoining the said island, and that whatever jurisdiction his Majesty, in virtue of his office of admiralty, would have [ \* 267 ] possessed over the same had not such grants been made, did in virtue thereof become vested in Sir C. Hatton; and that there were several instances of the exercise thereof by Mr. Bankes."

*Addams and Nicholl*, for Mr. Bankes.

*The King's Advocate and Phillimore, contra.*

SIR J. NICHOLL. This was a proceeding, in the first instance, by the king, in his office of admiralty, against several casks of brandy, alleged to have been found derelict, in order to have them condemned as droits, in case no owner should appear within the time prescribed by law. In the course of the proceedings, an intervention took place on behalf of Mr. Bankes, claiming to be entitled to part of the goods, as a perquisite belonging to him in the character of owner of the castle and manor of Corfe Castle, and of the island of Purbeck, in the county of Dorset, asserting that right under a title originally acquired by a grant from the crown. In support of this claim, the history of the title, and of its acquisition, is set forth in an act on petition on behalf of Mr. Bankes; and, in verification of the claim, copies of ancient grants and other documents, and also affidavits, are exhibited.

In order that the view of the subject taken by the court may be understood, it may be proper to state briefly the substance of what is alleged in the act on petition. It begins by setting forth that a commission was issued by the crown in the 4 Rich. II., to inquire "what rights, &c., and other things, did anciently and then belong to the Castle of Corffe, whereof the king was then seised in his \*demesne of fee," and that this inquisition was actually [ \* 268 ] taken by the commissioners, who returned "that the whole island of Purbeck was the warren of the king, and pertained to his said castle;" they also set forth the limits and boundaries of the Isle of Purbeck — to parts of which it will be necessary to advert presently, and the whole question may depend in a considerable degree on these bounds — and "that all pleas of vert and venison, and also of wreck of the sea, pertained to the castle aforesaid, and ought to be determined by the constable and his steward; that the constable had



taken wreck of the sea time out of mind, even till then; and that the king, from time out of mind, had received all royal fishes caught on the coast aforesaid." It then refers to a grant made by Henry VIII. to Queen Katharine, of the hundreds of Rowboro' and Hasler, (which, it is alleged, comprehended and now comprehends the whole of the Isle of Purbeck,) "together with all treasure-trove, wreck of the sea, flotzam, &c., and royal fishes, when they should happen within the said hundred and its limits." This, however, was a grant for life only. The act on petition then states a grant by Queen Elizabeth to Sir Christopher (then Mr.) Hatton, of the castle of Corfe, in the County of Dorset, and its lordship and manor and appurtenances in the Isle of Purbeck, with all its rights, warrens, franchises, wrecks of the sea, shipwrecks, and preëminences whatsoever, to him, his heirs and assigns forever, as fully as they were enjoyed by Queen Katharine or any others.

Two further grants of Queen Elizabeth—the 18th and 27th—are then referred to. They confirm to Sir Christopher Hatton [\*269] "the ancient boundaries of the lordship and manor of Corfe Castle and Isle of Purbeck;" and give to him, his heirs and assigns, an exclusive admiralty jurisdiction "within the said castle, lordship, and manor and island of Purbeck and its precincts, by land and water, and upon the high sea flowing to or adjoining the said island, or any part thereof;" and the Lord High Admiral and his officers are prohibited from entering or exercising any jurisdiction, by land or by water, "within the said castle, lordship, manor, or island, or the precincts of the same." These words, affirmatively and negatively, are very strong and full as far as they go; and their true intent and meaning, their construction, and their extent will require to be carefully examined and ascertained.

The petition then refers to a proceeding in the Court of Exchequer, and to a judgment given by that court upon an information filed by the Attorney-General against Sir Ralph Bankes, to show by what authority he exercised rights of admiralty within the said island, and then states, that the castle, manor, and lordship of Corfe, and hundreds of Rowborough and Hasler, have descended and do belong to Mr. Bankes.

The petition then goes on to state the circumstances under which the articles proceeded against were picked up:—That fifty-five casks were afloat, and four were aground; that, of these, ten were carried to the custom-house at Weymouth, and forty-nine to the custom-house at Poole; that thirty-three of these forty-nine were found floating at distances not exceeding three miles from low-water mark, on different parts of the coast of the Isle of Purbeck, and belong not to

the king, but to the estate of Mr. Bankes; that ten others were \* either wreck of the sea, or were found between high [ \* 270 ] and low-water mark, and were not subject to admiralty jurisdiction, but that, if they were so, they were taken up within limits whereby they belonged to the estate of Mr. Bankes; and reference is made to proofs which explain the places and manner of the picking up of the several casks.

Here are, therefore, six casks not claimed at all; thirty-three are claimed beyond low-water mark, as not exceeding three miles; and ten between high and low-water mark, of which four were aground.

These are the material averments in support of Mr. Bankes' claim. The answer, on the part of the admiralty, consists rather of objections to and observations upon these averments, than of any new matter of fact or document.

The rejoinder offers replies to that answer.

It now becomes necessary to consider the whole case; and, it being a question of some importance, and also of some novelty, it may be proper, in the examination of it, to refer to the principles, authorities, and evidence which ought to guide the judgment of this court.

By the general law, all goods found afloat and derelict on the high seas belong, as droits, to the crown, in its office of admiralty. This claim, at least the greater part of it, is, therefore, in derogation of the general law, and of that right, and must be clearly made out before it can be admitted. It is asserted to be derived to the claimant under a grant from the crown.

How far the crown had the power of granting away rights and perquisites which had always belonged to a high office of state, which had already been granted to the person exercising that office, \* (for it may be presumed that there was at all times a high [ \* 271 ] admiral, the exercising the office by commissioners being of modern date,) may be questioned, however clearly such a grant may be intended and expressed; at all events, such a power in the crown is not to be presumed.

But, this being a grant from the crown, how is it to be construed? The construction of such a grant, at the suit of the subject, is to be taken most beneficially for the king and against the grantee, whereas the grant of a subject is to be construed most strongly against the grantor; and, as Mr. Justice Blackstone observes,<sup>1</sup> "The king's grant shall not enure to any other intent than that which is precisely expressed in the grant." So Lord Stowell, in the case of *The Rebecca*<sup>2</sup>:—"All grants from the crown are to be strictly construed

<sup>1</sup> Bl. Com. vol. ii. p. 347.

<sup>2</sup> 1 Rob. 230.

against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground, that the prerogatives, rights, and emoluments of the crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant, by necessary and unavoidable construction, shall take away." This was upon a question as between the king and the lord admiral, and it was there held that the lord admiral had these droits in preference to the king himself. Such, then, is the principle upon which the grant made to Sir Christopher Hatton is to be construed.

To ascertain, then, what the crown intended to grant, it is [\*272] proper to consider what was the subject-matter\* to which the grant was to be applied, and this we shall best discover from the very first document introduced here — the inquisition, taken in 4 Rich. II., showing the nature and extent of the place or thing granted. The commissioners were to inquire what rights by immemorial usage (that is, by the common law of the land) belonged to the constable of Corfe Castle, its manors, and the Isle of Purbeck, which, by forfeiture, had then become vested in the crown. The commission recites, "that very many of the possessions, rights, and liberties of our castle and manor of Corffe, are aliened and removed from the same, owing to the default of our keepers and constables, to our grievous loss and disinheritance," and proceeds, "We, therefore, willing to be certified thereupon, have assigned you to inquire," &c.

Here, then, is an inquiry about a land property, and it might have been just as well applied to a castle and manor in the centre of the kingdom, as to one on the sea-coast. Here is no trace of any maritime rights or perquisites that had been infringed; nothing of shipping, or of any naval subject; nothing of any admiral, or any admiralty rights, so far as can be inferred from the commission. The manor happens to be in a maritime county, and upon the sea-coast, and it has prisage of wine, if shipping, coming on the coast, shall land with cable and anchor; but here is no trace of its possessing any peculiar rights and privileges of a maritime kind, no more than what, of common right, belongs to every manor bordering on the sea shore, but part of the land and county in which it is situated. The

commissioners execute their duty and make their report, and [\*273] with great propriety\* describe the exact limits and boundaries of the castle and manor and island; and, in order to understand this description of the limits, it is necessary to ascertain some of the localities of the place itself, and the meaning of the expressions used by the commissioners, for they will be found quite

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correct, when the reason of the different expressions used comes to be explained; and, by which means, a considerable portion of the doubts in this case will be removed.

For the purpose of ascertaining these localities, I have consulted the ordnance map, and some gazetteers of reputation; and I find, that the extreme western point of the Isle of Purbeck on the sea-coast, set down in the report of these commissioners, is Flouresberie, or, as more correctly called in the ordnance map, flowers barrow; it then goes northward, through Luckford Lake, to the river Frome, and along that river to Wareham Bridge; and then comes this description, "and so from that, by the sea, eastwards to Stodland Castle, and thence along the sea-coast westwards till it reaches, again, Flouresberie." The question naturally suggesting itself upon this, is, why is it expressed "by the sea eastwards," and "by the sea-coast westwards?" The whole of the line eastwards is along a large bay or inland sea—not the high sea—forming the harbors of Poole and Wareham; it is sixty miles in compass—following the margin or shore line; twelve miles long; seven miles wide; contains many islands, creeks, and waters; and has always, I believe, salt water. It is said, (and it is an extraordinary peculiarity if true,) that the sea ebbs and flows in it four times in every twenty-four hours;

it is joined to the \* British Channel by a very narrow open- [ \* 274 ] ing, not more than a quarter of a mile wide. This great bay or sea is not the high sea, for it is within the county of Dorset "*infra corpus comitatús*." The extreme point going eastwards is described as "Stodland Castle;" and the line then goes westwards. Now "Stodland Castle" was probably not at the village of Studland, but stood at the eastern point of Brownsea Island, within the bay of Poole; it was in the parish of Studland, and within the Isle of Purbeck, according to the inquisition; or, if there was another castle near the village of Studland, it would still be within the Isle of Purbeck, and would not comprehend any part of the high sea. The castle is converted into a family mansion; but there is still a battery to guard the mouth of the harbor.

I will here read three or four short extracts, from a gazetteer, confirmatory of what has been stated. Potts, in describing the Isle of Purbeck, says, "The bridge crossing the Frome from Wareham connects the north part of the county with this isle, which comprehends the whole of the south-east corner of Dorsetshire, from Luckford Lake, on the west, to the sea, and river Frome on the remaining sides; its greatest length is about twelve miles; its general breadth about seven."

"The town of Poole is a county of itself, and is situate on a pe-

ninsula, connected with a narrow isthmus with the mainland; the peninsula is about three quarters of a mile long and half a mile broad. Poole Bay unites with the British Channel by a narrow entrance on the east, and, including all the windings on the shore, exceeds sixty miles in compass. A singular phenomenon [\*275] occurs in Poole \* harbor; the sea ebbs and flows four times in twenty-four hours; twice when the moon is S. E. and N. W., and twice when the moon is S. by E. and N. by W."

"Studland," the same writer says, "is six and a quarter miles E. N. E. from Corfe Castle; it is a small village near a romantic range of cliffs ending in a narrow neck of land called South Haven Point, and forming a boundary of Poole harbor. Brownsea Island is in Poole harbor, but in the parish of Studland, at the end of the bay of Poole, opposite the entrance; it contains about three hundred acres; it had formerly a castle, now converted into a family mansion, at a small distance east from which is a platform of twelve nine pounders." This accounts for the description, "by the sea eastwards to Studland Castle." It was hardly possible to describe the boundary in any other way; it was not high sea; it was part of the island, and the county of Dorset. But, when they come to turn and to describe the limits westwards by St. Alban's Head and back to Flowersbarrow, they do not say "by the sea westward," but "along the sea-coast." Now the coast is, properly, not the sea, but the land which bounds the sea; it is the limit of the land jurisdiction, and of the parishes and manors — bordering on the sea — which are part of the land of the county. This limit, however, and its character, varies according to the state of the tide; when the tide is in, and covers the land, it is sea; when the tide is out, it is land as far as low-water mark; between high and low-water mark it must therefore be considered as *divisum imperium*. I think that Spithead, and the Solent sea generally, are within the county of Hants, and have been held to [\*276] form part of the land jurisdiction.<sup>1</sup> \* I may here remark, that there is nothing in the inquisition that extends the boundaries of Corfe Castle into any part of the high sea, or beyond the usual line which divides the land from the sea in every part of the British coast. It mentions that the constable has in all times taken "wreck of the sea;" and so has at all times every lord of a manor in the kingdom — or, at least, has claimed so to have it. But again, what is "wreck of the sea or shipwreck" — for the words are used without distinction — in strict legal meaning? — they are "*bona*

<sup>1</sup> See The Public Opinion, 2 Hagg. Adm. Rep. 402.

*waviata* ;” and when the sea has brought them to land they then are within the land jurisdiction. “Wreck of the sea,” then properly so called, belonged to the owner of Corfe in the time of Richard II., and so it has ever since, and has sometimes been taken by Mr. Banks; and even “flotsam,” if within the bay of Poole and Wareham, would belong also to him, because found within the manor, and not on the high sea.

Thus the matter stands upon the inquisition of Richard II., and the true meaning of the boundaries and limits of the Isle of Purbeck; it becomes necessary, therefore, to examine whether the patents carry the right any further. The title set up by the claimant is derived from grants made by Queen Elizabeth to Mr. Hatton, afterwards Sir Christopher Hatton, and Lord High Chancellor; for the grant by Henry VIII. to Queen Katharine expired with her life; and the grant to the Duke of Somerset having become forfeited, the property was in the crown under Queen Mary, and until the 14th of Elizabeth.

The first grant relied upon is in the 14th of Elizabeth. It is deposited in the Rolls Chapel, and is brought into court duly authenticated, \* written out *per extensum*, and accompanied [ \* 277 ] by a verified translation; it is, therefore, regularly before the court as evidence. It is entitled, “A grant (*inter alia*) of the Castle, Lordship, and Manor of Corfe, in the county of Dorset;” but it is rather a sale than a special favor, for in consideration of 4,761*l.* paid into the exchequer by Mr. Hatton — “one of our gentlemen pensioners” — it grants the manor to him, his heirs, &c. The usual words, “for the consideration aforesaid of our special grace,” are thrown in; but the whole tenor and object of the grant is a land grant to “Mr. Hatton, his heirs, and assigns, of the manor of Corfe, with the demesne lands, and of the mill, waters, and streams, situate and being in Corfe aforesaid in our county of Dorset.” But here is no reference to any thing marine, except “wrecks of the sea, shipwrecks, and preëminences whatsoever to the said lordship, manor, or castle belonging.” Here is not the least trace or suggestion of extending the boundaries, or of enlarging the grant beyond what belonged to this land and property as such; nor is there the slightest appearance of an intention to infringe the rights, or abridge the perquisites of the Lord Admiral, or to alter the admiralty jurisdiction.

It may here be necessary to refer to some authorities, in order to ascertain what is legally meant by “wreck of the sea,” or “shipwreck.” “It is to be observed,” says Blackstone, “that in order to constitute a legal wreck, the goods must come to land; if they continue at sea, the law distinguishes them by the uncouth appellations of jetsam, flotsam, and ligan. These three are, therefore accounted

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so far a distinct thing from the former, that by the king's [\* 278] grant to a \* man of wrecks, things jetsam, flotsam, and ligam will not pass."<sup>1</sup> In the 2d Inst.,<sup>2</sup> "wreck, or shipwreck, legally '*wreccum maris*,' wreck of the sea, in legal understanding, is applied to such goods as, after shipwreck, are by the sea cast upon the land." And Blackstone also says:—"shipwrecks are declared to be the king's property by the Perogative Stat. 17 Ed. II. c. 11,<sup>3</sup> and were so long before at the common law;" and in Sir Henry Constable's case<sup>4</sup> the distinctions between *wreccum maris*, flotsam, jetsam, and ligam are explained.

It may also be convenient here to notice, more particularly, the nature of the office of lord high admiral; its rank, its importance, its rights, and duties; to refer to some authorities concerning it, and to inquire how far these patents can be pretended or intended to extend, or can legally infringe upon, that office.

According to the constitution of this country, the monarchy is in many respects limited by ancient usage, which, in effect, constitutes the common law of the land. The sovereign cannot execute all his duties in person, but the executive government is carried on by certain officers, whose duties, rights, and perquisites are settled by usage, of which there is no legal memory to the contrary. The sovereign,

by his prerogative, appoints the persons who fill these offices, [\* 279] such as \* his courts of justice, his office of chancery, his office of treasury, and among others, his office of admiralty. These offices are sometimes filled by a single person, at other times commissioners are appointed to execute them; they are great officers of state, and have precedence above peers of the same rank; among them is the Lord Admiral.<sup>5</sup>

In early times there were occasionally more Lord Admirals than one; not, however, of the same part of the coast, but one from the Thames northward, and one southward, besides the lord warden of the Cinque Ports, but not interfering with each other. Which, however, was the most ancient form of executing this office, whether by one officer or by several, is mere conjecture; and it is, I think, so stated in the "Matter of The Whale."<sup>6</sup> But, however that may be, I am not

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<sup>1</sup> Bl. Com. Vol. I. 290, 292.

<sup>2</sup> P. 167.

<sup>3</sup> "The king shall have wreck of the sea throughout the realm, whales and great sturgeons taken in the sea or elsewhere within the realm, except in places privileged by the king."

<sup>4</sup> 5 Rep. 106, where it is resolved "that nothing shall be said *wreccum maris*, but such goods only which are cast or left on the land by the sea."

<sup>5</sup> 81 H. VIII. c. 10.

<sup>6</sup> 2 Hagg. Ad. R. 438.

aware that more than one Lord Admiral has ever been appointed since the time of Henry VIII., and the statute alluded to only speaks of "the Lord Admiral." The office is in part executive, and in part judicial. The Lord Admiral was to fit out and manage all the marine force of the country—to build ships, to appoint officers, to command the ships at sea by himself and his officers. His judicial duties were to be executed by his lieutenant, as judge of the court, who had jurisdiction over all matters arising upon the high seas, and was appointed by the Lord High Admiral until the time of William and Mary, when Lord Pembroke was appointed by the crown, under the great seal, and for life. To the office of Lord High Admiral certain perquisites belonged from time immemorial; and it is to the king, not "*jure coronæ*," but to his Majesty in his office [ \*280 ] of admiralty, that these droits now belong, unless, by the authority of parliament, they are otherwise applied.<sup>1</sup>

The patent of Lord Pembroke grants to him during pleasure, as all these offices are granted, the office of Lord High Admiral of England, Ireland, and Wales, and all the dominions and territories (enumerating those in parts beyond the seas) thereunto belonging. It grants to him all the rights, and perquisites, and jurisdictions of the office, amongst them, "derelicts, wrecks, flotzam, jetsam, and ligan;" it also gives him the command of the forces at sea, the appointment of officers, and the direction of the building, repairing, fitting out, and manning all the ships of war.

The patent of Prince George of Denmark, in the 1st of Anne, granted to him the same rights, the same duties, and the same fees and perquisites. But in the same year a deed of surrender was executed by the Lord Admiral, by which he surrendered to the queen "all the profits and perquisites of the office (except 2,500*l.* a year, to be disposed of for such particular uses as her Majesty should direct) for the public use during the war, as her Majesty should also direct."

These perquisites, therefore, then belonged to the office of Lord Admiral; they were only given up during the war to the use of the public; and this, I apprehend, was the first time in which these perquisites were in any manner severed from the office where 'there was a Lord Admiral, and the severance led to the [ \*281 ] first Prize Act. Since that arrangement, the office has been in commission, except for a short time when his present Majesty, then Duke of Clarence, was appointed to it in the reign of George IV.

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<sup>1</sup> By 1 Will. IV. c. 25, all droits are carried to and made part of the consolidated fund; but by section 12 the crown retains the power of granting out of them a reward to seizers or informers relating thereto.



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In all these subsequent patents and commissions, the droits of the office have been reserved to the king, and are now considered as commuted and transferred to the public, so that the present question is between the claimant and the public.

But the terms of the commission in which the droits are reserved serve to show that they belonged to the office:—"And whereas all wrecks of the sea, goods taken from pirates, and divers droits, rights, duties, and privileges, have been, by express words or otherwise, heretofore granted to our said Lord High Admiral, and to former admirals, for their own benefit as duties appertaining to their office or place of our High Admiral aforesaid, now it is our further pleasure, &c., &c., that they shall be reserved to our only use and behoof, and not otherwise." These are the terms used in all the grants; they therefore record that these droits were always granted to the Lord Admiral; that they consequently were an existing grant at the time when the patents to Sir Christopher Hatton issued, and so could not legally be granted to him; but, in truth, there is no reason to believe that there was the least intention that these droits of the office of admiralty, on the high sea, should be lopped off from that office; and it is curious enough, that when, in the reign of William and Mary, the office was put in commission, a doubt arose whether the [ \* 282 ] commissioners could legally discharge all the \* duties of the office, and the 2d and 3d William and Mary, stat. 2, c. 2, was passed, declaring that all the duties might be legally executed by them.<sup>1</sup>

The importance, antiquity, and authority of the office of the Lord Admiral may be seen in the 4th Inst.,<sup>2</sup> where Lord Coke is stating the answers to the complaint of that jurisdiction; and he mentions some points as to the legal mode of granting, and grants that would be void. "The king," he says, "did by charter constitute John, Duke of Exeter, and Henry, his son, to be '*Admirallos Anglæ pro termino vitæ*,'" and this charter, being a judicial office and granted to two, we hold to be void, for such ancient offices must be granted as they formerly have been.' So Blackstone also remarks, "No judicial office can be granted in reversion, because, though the grantee may be able to perform it at the time of the grant, yet, before the office falls, he may become unable and insufficient; but ministerial offices may be so granted, and may be executed by deputy."<sup>3</sup>

With respect to the limits of the admiralty jurisdiction, I will just cite the following authorities. "Admiralty causes," says Blackstone,<sup>4</sup>

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<sup>1</sup> See Life of Sir Leoline Jenkins, vol ii. p. 706.

<sup>2</sup> P. 146.

<sup>3</sup> 2 Bl. Com. p. 36.

<sup>4</sup> 3 Bl. Com. p. 106.

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must be causes arising wholly upon the sea, and not within the precincts of any county; for the stat. 13 Rich. II. c. 5, directs that the admiral and his deputy shall not meddle with any thing but only things done upon the sea; and the stat. 15 Rich. II. c. 3, declares that the Court of the Admiral hath no manner of cognizance of any other thing done within the body of any county, either by land or  
 \* by water, nor of any wreck of the sea, for that must be cast [ \* 283 ] upon land before it becomes wreck. It is otherwise of things flotsam, jetsam, and ligan, for over them the admiral hath jurisdiction, as they are in and upon the sea." And Lord Coke, in the 4th Institute,<sup>1</sup> says, "By the laws of this realm, the Court of the Admiral hath no cognizance or jurisdiction of any contract within any county of the realm, either upon the land or upon the water; but all things arising within any county of the realm, either upon the land or the water, and also wreck of the sea, ought to be heard and be remedied by the laws of the land, and not before the admiral nor his lieutenant in any manner, so as it is not material whether the place be upon the water *inter fluxum et refluxum aquæ*, but whether it be upon any water within any county." So in the 3d Inst.,<sup>2</sup> in explaining the stat. 28 Hen. VIII. c. 15, he says, that "a port, haven, or creek is *divisum imperium*, except when in the body of any county." Again, in Wood's Institute<sup>3</sup>:—"The Admiralty Court hath jurisdiction to determine all maritime causes arising wholly upon the sea out of the jurisdiction of a county. A judgment of a thing done upon land is void. It is no part of the sea where one may see what is done on one side of the water and the other. So note, that below the low-water mark the admiral hath sole and absolute jurisdiction, but between high-water and low-water mark the common-law and the admiral have jurisdiction by turns—one upon the water, the other upon the land; but if the water is within a county, the common law claims jurisdiction." It is not necessary, for the  
 \* purposes of this case, to pursue further the authorities on [ \* 284 ] this point.

Having ascertained what is the principle of construction governing these grants of the crown, what was the nature of the crown's possession in Corfe Castle and the Isle of Purbeck, what were the extent and limits of that possession, what was the line of separation between the common law jurisdiction on the land and the admiralty jurisdiction on the sea, what was the nature of the office of admiralty, and of the persons exercising that office and its jurisdiction, the court has

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<sup>1</sup> P. 134.

<sup>2</sup> P. 117.

<sup>3</sup> P. 496.

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sufficient light to see its way into the true intent and meaning of these further grants of the 18th and 27th of Elizabeth.

It is clear from what passed in the reign of James I. — as may be collected from the 4th Institute — that, notwithstanding the statutes 13 & 15 Rich. II., there were perpetual conflicts and encroachments between the common law jurisdiction and that of the admiralty. From the statutes of Rich. II. to the 18th Eliz., nearly 200 years elapsed. During this time, the nation had been involved in almost a continual struggle, first by the wars of the Roses, and afterwards by the Reformation and its consequent religious conflicts; and it is probably owing to these circumstances that the line drawn by these old statutes would seem to have been effaced and forgotten; and in the 18th Eliz., Sir Christopher Hatton, then Lord Chancellor, obtained this further grant, a sort of declaratory patent. Now the very ground of, and introduction to, this grant, was, that the jurisdiction of the grantee had been disturbed by the admiralty jurisdiction, [ \*285 ] although the castle and manor of Corfe \* was within the county of Dorset. Again, if this grant or declaratory patent is looked at carefully, it will be found to be confined to, and confirmatory of, the ancient boundaries, and therefore bringing the limits within those mentioned in the inquisition; for it declares the Isle of Purbeck, and every place within its limits, as well by land as by water, to be exempt from the admiral and the admiralty jurisdiction, "That within the said island the admiral of the kingdom shall not interfere, and that the owner of the castle and island shall exercise all admiralty rights within the same." In every part, affirmatively and negatively, it excludes the interference of the admiralty; but in every part it limits the grant to the island itself — "within the said island and the precincts thereof."

With respect to the additional words introduced into the subsequent patent of 27 Eliz., they carry the matter no further in their true construction. The recital in this patent is nearly the same as that in the earlier patent; it is limited in like manner and to the same extent, "within the said island and its precincts;" then come the additional words, "High sea flowing to or adjoining the said island;" but this phrase proves too much if relied upon as meaning the sea before it would have arrived at the island; for in that case the whole ocean, or at all events the whole tide coming up the British Channel, as it flows towards, might be said to flow to, the island. If, however, the waves have arrived at the island and there brought to ground any wreck, such wreck, by the inquisition, by the general law, and by these patents, would belong to the owner of Corfe Castle. So also the words "ports, rivers, creeks, arms of the sea, and other

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“places whatsoever, being within the aforesaid island,” apply [ \* 286 ] to this great haven, with its ports, rivers, creeks, and islands, which are described by the ancient inquisition as being within the said island and the county of Dorset, and would, I apprehend, convey even flotsam, jetsam, and ligan, in that precinct, to the owner of Corfe Castle.

The words then of these grants of the 18th and 27th of Elizabeth do not seem to carry the claim to the extent set up; but the true intendment of the grant or patent of the 18th Eliz. may be well ascertained from its general import and nature; it was to protect the owner of Corfe from the interruptions of the admiralty and its officers within the limits of that ancient possession, and not either to extend these limits, or to deprive the great state officer of the admiralty of any established legitimate powers which belonged to the office. There is not a word in the prayer for the grant as to any extension of the limits of Purbeck; the old boundaries are confirmed by the grant; but it was not meant to cut off any portion of the rights of the admiralty, or to transfer any of its duties to the grantee of Corfe Castle. It recites the importance of Corfe Castle as a place of defence, but of defence of the realm, not of the shores and coasts of the realm, for the castle is three or four miles inland, and could only defend the realm when the enemy had got into the island. It grants Brownsea Castle, not to the grantee and his heirs, but for life; that castle was on an island within the precincts and guarded the mouth of the harbor of this great bay. With respect to defence, what are the duties imposed and what is the authority conferred by the grant? The constable is to muster the inhabitants and to do duty \* in the [ \* 287 ] castle; but he is to perform none of the duties which belong to the admiral of the realm. Here is no fitting, or repairing, or manning of ships mentioned; no command of the mariners while at sea, no appointment of naval officers; nothing in short of a naval sort; nothing to assist, or to relieve, or to abridge the duties of the Lord High Admiral. The grant was, in fact, to do no more than the old statutes and the general law did before — to enable the grantee to enjoy his wreck of the sea, and possibly flotsam in the bay of Poole, or at least that side of it within Purbeck; and to prohibit the admiralty from disputing or interfering with those droits; but the Lord Admiral retained all his rights and duties not only on the high sea beyond low-water mark, but also over this *divisum imperium* within low-water mark when covered by sea.

Taking then this view of the construction of these patents, it may be unnecessary to inquire whether, if they were intended to convey these droits of admiralty, arising on the high seas, they could be legal

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to any such effect. It must be presumed that the office of Lord High Admiral was at all times existing, and there is no reason to doubt that it did exist at the very time of these grants; these droits did, therefore, under an existing grant, belong to the crown, in its office of admiralty, as they had done from time immemorial. Grants, then, must be made as usually granted; and if there were an existing grant of droits on the high sea, these grants would be illegal and void if they extended beyond the perquisites belonging to the owner of Corfe within the island. To the extent claimed, and to the grant [\* 288] tee, his heirs and assigns, it would \* be an illegal grant and void; it could only be what it is in terms—a land grant within the manor and island.

Nor do the exchequer cases and judgments appear to throw any additional light upon the claim; they are evidently proceedings respecting land revenues, calling upon the owners of these two hundreds, which constitute the Isle of Purbeck, to account for certain fines and other manorial rights which in general belong to the crown. The owners thereupon plead these patents; the crown is satisfied, and the proceedings are dropped. So far then as respected the crown, and the question relating to its land revenues in the Court of Exchequer, the grant was a good defence; but there was no question then raised respecting the admiralty droits; the Lord Admiral was no party to those proceedings; they could not affect his rights, for from some accounts brought in by the present claimant, it appears that nothing but wreck had been received since the time of Eliz.; or at all events from that of Car. I.; and wreck of the sea is land revenue, and is generally granted to the lord of a manor on the coast; and in the exchequer cases there was nothing upon this point decided.

A number of affidavits from old persons have been brought in, stating instances in which goods cast on shore, and on some cases fetched on shore, have been taken by the owner of Corfe Castle; but they prove nothing; they all passed *sub silentio*; and it is probable that the lord of every manor in the kingdom lying on the sea shore, might set up the same claim and support it by the same sort [\* 289] of usage, so far at least as the droits of \* the admiralty are concerned. In most instances the wreck is given up to the lord, though it is to be feared that in some cases the inhabitants of the Isle of Purbeck, as well as those of other parts of the kingdom, might so far contest the lord's rights as to make away with the wrecked goods.

As little effect does the court give to the case of the bale of cotton given up by the commissioners of customs upon the opinion of their law officers. The commissioners of customs had no claim upon the

goods beyond the duties; whether the cotton belonged to the admiralty or to the grantee of the crown, was a question they would not contest; it had been brought on shore at Purbeck, and the customs had no interest in contesting whether it belonged to the owner of Corfe Castle, or to the admiralty.

Again, it is said that there is no instance where the admiralty has set up a claim; but is there any instance where notice has been given to the admiralty that the goods have been picked up and brought in from a considerable distance beyond low-water mark? These goods were picked up floating at sea, and carried either to Poole or Weymouth; and was it not the duty of the lord, or his steward, to give notice where goods had been brought in from beyond low-water mark? for as to the right of the lord extending three miles beyond low-water, it is quite extravagant as a jurisdiction belonging to any manor. As between nation and nation, the territorial right may, by a sort of tacit understanding, be extended to three miles; but that rests upon different principles, namely, that their own subjects shall not be disturbed in their fishing, and \*particu- [ \*290 ] larly in their coasting trade and communications between place and place during war; they would be exposed to danger if hostilities were allowed to be carried on between belligerents nearer to the shore than three miles; but no person ever heard of a land jurisdiction of the body of a county which extended to three miles from the coast.

Again, franchises may be lost by nonuser or misuser. Here is a grant of the office of admiralty, which necessarily includes the judicial functions of that office. It may well be a question whether such grant to a person, his heirs and assigns, was not a void grant. Even with respect to wreck of sea, there seems to have no judicial proceeding after the 14th Car. I., in a court leet or court baron. And what is the duty of the grantee in such cases? To proceed judicially; for there is a year allowed for the owners to appear, and the salvors have also a right to come in for their remuneration; those were rights recognized in *The Augusta*;<sup>1</sup> so that at all events it is the duty of the lord to wait for a claim on the part of owners or salvors, and to have a judicial decision. From the accounts brought in, in this case, of manoral droits, I see no trace on the part of the lord of any desire to wait his year and day; his steward takes the goods, gives some reward to the finders at the time, and the proceeds are carried to account. This is not a very regular mode of proceeding in the case

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<sup>1</sup> 1 Hagg. Ad. Rep. 18, and 1 & 2 Geo. IV. c. 75, s. 26.

of any goods, even in such as were *primâ facie* wreck of the sea.

However, the court is not called upon to decide that question; [\* 291] but it having been noticed by the law officers of the crown, it could not be passed over *sub silentio*.<sup>1</sup>

The court has now touched upon all or most of the points which have been raised in argument, or attempted to be supported by evidence; perhaps, indeed, it ought to have been adverted to some reference which has been made to a custom in the west of England;<sup>2</sup> but no such custom is mentioned in the inquisition as existing in or belonging to the Isle of Purbeck; and the claim is not set up under a custom, but under these grants from the crown.

Having gone so much at length into the law applying to the case, which the novelty of the question seemed to demand, it is not necessary to recapitulate the heads. The court holds it to be pretty clear, that such part of the goods as were picked up on the high sea, (that is, not within any land jurisdiction,) belong to the office of admiralty; and that those which were found within the limits of the Isle of Purbeck are wreck of the sea and belong to the claimant. It only remains, therefore, to see how the law applies to the several portions of the property involved in these proceedings.

The whole number of casks picked up is fifty-nine; of these fifty-nine, ten were carried to the custom-house at Weymouth, and forty-nine to that at Poole. The latter only are directly included in this suit,

but the same rule will probably be considered as applying [\* 292] to the whole. A correct schedule has been usefully and fairly made of the whole, and they have been classed under eight heads:—

Class 1. Six casks picked up beyond the utmost limits contended for; these are not included in the claim, and of course go, as droits, to the king in his office of admiralty.

Class 2. Thirty-eight casks picked up outside of low-water mark, but within three miles of the shore. They were afloat on the high sea, beyond low-water mark, not in the body of any county or the limits of the Isle of Purbeck, and consequently likewise belong to the office of admiralty. The court, therefore, with respect to them, pronounces against the claim.

Classes 3 and 4. These were afloat between high and low-water

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<sup>1</sup> In *Dunwich (Bailiffs, &c.) v. Sterry*, 1 B. & Adol. 831, it was held, that the grantee of wreck has a special property in all goods stranded within his liberty.

<sup>2</sup> At the end of the 3d resolution in *Sir Henry Constable's Case*, 5 Co. 107, is this passage: "and those of the West country prescribe to have wreck in the sea so far as they may see an Humber barrel."

marks, but being afloat, and never having even touched the ground, although in the *divisum imperium*, they had not become "wreck of the sea;" the court, therefore, pronounces against the claim.

Classes 5 and 6 stand on more favorable grounds. Class 5 consists of three casks found aground—the tide being out—between high and low-water mark; they are wreck of the sea, and belong to the Isle of Purbeck and its grantee.

Class 6 consists of five casks which having taken the ground between high and low-water mark, though still moved by the waves—the sea at one time surrounding them, and, at another, leaving them dry—may be considered not as on the high sea, but as wreck of the sea; they had, it would seem, actually struck the ground; and though bumped about by the waves, it seldom happens that the shore is without some portion of water \* upon its surface, [ \* 293 ] or amongst the crevices of rocks. It certainly, however, according to the affidavits, may admit of a doubt whether these five casks were more in the land than the sea jurisdiction, but under such circumstances the crown probably will not press for a construction unfavorable to the grantee.

Class 7 refers to one cask afloat, and though the land underneath was dry at low water, even in neap tides, yet in this "*divisum imperium*" the admiralty has the benefit of its jurisdiction at the time the cask was taken possession of.

Class 8, on the other, has the benefit of being taken when aground, and belongs to the Isle of Purbeck, and to the claimant. Thus the court allows the claim to nine casks, and decrees the rest to be droits of the crown in its office of admiralty.<sup>1</sup>

It appears that in conveying the forty-nine casks to Poole, one was broken and its contents lost; and in conveying the ten casks to Weymouth, one and a half was lost in the same manner. These losses were merely accidental. If it can be ascertained whether the casks spilt were part of those for which the claim is allowed, or part of those become droits, the loss should be borne by the party to whom they legally belonged; but if that cannot be done, the loss should be apportioned according to the quantity condemned, and the quantity decreed to the claimant. There probably will be no difficulty in settling this matter; but if there is, it must be referred to the registrar, who will apply the principle just stated by the court.

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<sup>1</sup> See the next case.



## [ \* 294 ] \* THE KING (in his office of Admiralty) v. TWO CASKS OF TALLOW.

May 10, 1837.

Things floating, though between high and low-water mark, and having touched the ground, cannot be *wreckum maris*; if fixed to the land between high and low-water mark, though with some water round them, they are *wreckum maris*. If after having once touched the land between high and low-water mark, they are again afloat, they are not necessarily *wreckum maris*, but their legal character will depend on the particular circumstances.<sup>1</sup>

In an act on petition, it was alleged "that the lords of the manors of Caister Pastons and Caister Bardolfes in the county of Norfolk have from time immemorial taken all goods, merchandises, and parts and pieces of vessels and ships wrecked or cast upon the beach or sea shore of the said manor; that in the night between the 19th and 20th of December, 1825, two casks of tallow were wrecked on the beach within the said manors, and were there taken up and secured and afterwards lodged in the custom-house at Great Yarmouth, and that the said two casks have since been arrested by virtue of a warrant issued out of this court at the suit of the king in his office of admiralty as being found derelict, flotsam, jetsam, or ligam;" but it was expressly alleged that "inasmuch as the said casks were found, taken up and secured after they had grounded upon the beach and within the boundaries of the said manors," they were not the property of the crown but of Thomas Clowes, Esq., the lord of the manors.

To this it was replied by the Admiralty Proctor: "admitting that the lords of the manors of Caister, &c., &c., may have taken all goods, merchandises, and parts and pieces of vessels wrecked or cast upon the sea shore of the said manors, the tide being out, he denied that the two casks of tallow were found, taken, and secured after they had grounded upon the beach within the manors aforesaid, for [ \* 295 ] he alleged that the same were found \* derelict, flotsam, jetsam, or ligam in and upon the high sea and within the jurisdiction of this court, and that they did not become grounded on the beach or shore till after the act of salving the same had commenced by the salvors, who were obliged to go into the sea for that purpose, it being after low water. And he further alleged and submitted, that even if the said casks were salvaged after they had been grounded on the beach

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<sup>1</sup> [As to what will constitute a *wreckum maris*, see also *The Pauline*, 2 W. Rob. 358; *The King v. 49 Casks of Brandy*, 3 Hagg. Ad. R. 257.]

or shore, and between high and low-water mark, (which he did not admit, but denied,) yet the same having been found derelict, flotsam, jetsam, or ligan, and taken and seized as aforesaid in and upon the high sea and within the jurisdiction of this court, did not belong to the lord, but in default of any claim on behalf of the owners, to the crown as droits."

To this it was rejoined by alleging that "the casks had grounded before the act of salving the same commenced, and that it was not low water but at least half flood at the time."

One of the casks was sworn by the salvors to have been found by them floating at low water fifty yards from the shore; and the other to have been found also at low water, sometimes floating and sometimes striking; and that the salvors waded in and rolled them on shore. On the other side there were affidavits contradictory as to the state of the tide, and as to the impossibility of the salvors having rolled any cask on shore unless it had previously struck the ground.

Several instances were given in evidence of goods and pieces of wreck, both cast ashore and found floating in the surf, having been taken by the lord of the manors and his predecessors; and a general reputation was proved to the extent claimed. \* It [\* 296 ] was also proved that the lords had been accustomed to bury, at their own expense, bodies washed on shore within the bounds of the manors.

*Addams*, for the lord of the manor, contended, that stranded goods, if once they had grounded, even though floating in the surf when salvaged, belonged to the lord of the manor.

The *King's Advocate* and *Phillimore*, *contra*. It is only by special grant that any lord of a manor can be entitled to the sea shore, which belongs *de communi jure* to the crown. Many manors on the sea-coast are granted as inland manors; and such grants only convey a right to the shore at low-water mark, not to the same distance when the tide is flowing; a grant of a manor on the sea coast does not therefore necessarily include the shore, much less things flotsam, jetsam, or ligan.

PER CURIAM. Supposing these casks had been found fixed between high and low-water marks, would you contend that they were still "*super altum mare*?"

The *King's Advocate*. Certainly. Grants from the crown are to

be construed strictly, and that cannot, in strict interpretation, be "the shore" which is not free from water.

SIR J. NICHOLL. This case lies in a narrow compass, for there can be no doubt of the law, and the question of fact depends upon a small portion of the evidence. There are several historical affidavits that go rather beside the question, for they only prove acts of usurpation and encroachment founded upon a misapprehension of [ \* 297 ] the law. The real \* question is, whether these casks were found at sea or on the land; if at sea, the lord of the manor can have no claim; if on land, he may. *Prima facie*, all goods without an owner belong to the crown, and if a claim be set up against the crown, the party setting it up must show either an actual grant, or usage from which such a grant may be presumed, as might have been made conformably with law. Usage is not in itself good as against the crown, except as evidence from which such a grant may be presumed. Manors being part of the "*corpus comitatûs*," manorial rights and land jurisdictions, but the crown may in many instances have granted the royalties of certain manors to subjects. In most manors upon the sea-coast, the lords claim the royalty of wrecks, and prove their right as against the crown by the usage of taking them, and by the exercise of such right never having been questioned. But the vice of these affidavits is that they attempt to prove too much; they talk of wreck, flotsam, jetsam, and ligan as being the same thing, and of the lords and their stewards having been in the habit of taking them all. As far as wreck, they may be accurate; but as to flotsam they may have had no right whatever to take it. These affidavits also prove too much in other respects; they prove that the lords convert goods to their own use and sell them without waiting for the owners a year and a day, or even advertising for owners or insurers; nor does it appear that they take any steps to reward salvors, or those who secure and preserve the property when come to land, and therefore real wreck.

The law on the subject is quite clear; and as the court [ \* 298 ] has lately had to enter upon it very fully \* in the case of the

King v. Forty-nine casks of Brandy, it need not again refer to all the authorities.<sup>1</sup> "*Wreccum maris*" is not such in legal acceptation, till it comes ashore, until it is within the land jurisdiction; whilst at sea, it belongs to the king in his office of admiralty, as derelict, flotsam, jetsam, or ligan. Above high-water mark it belongs

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<sup>1</sup> See preceding case.

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to the lord of the manor as grantee of the crown ; but beyond low-water mark he can have no claim ; it is on the high seas and belongs to the admiralty. It is equally clear law that between high and low-water marks it is *divisum imperium* ; when the tide covers this space it is sea ; when it recedes, it is again land and within the jurisdiction of the manor. Constable's case, 5 Rep. 106. If the article be floating, it belongs to the sea ; it is not "*wreccum maris*," but "flotsam ;" if it become fixed to the land, though there may be some tide remaining round it, it may be considered as "*wreccum maris*," but it having merely touched the ground, and being again floating about, its character will depend upon its state at the time it was seized and secured into possession ; whether, for instance, the person who seized it, as salvor, was in a boat, or wading, or swimming.

Such, in my judgment, being the law, what are the facts ? There is an affidavit from the persons who brought the goods to shore ; and even supposing they were mistaken as to the state of the tide, there seems no reason to doubt that they went into the sea, and so within the admiralty jurisdiction, and that the casks, therefore, were not "*wreccum maris*," but flotsam. I cannot agree to the proposition that things having once \* touched the ground [ \* 299 ] thereby necessarily become the property of the lord of the manor. What might be the law in the case of things having become fixed on the shore and afterwards the sea leaving them and then returning, may be a question hereafter, but it is one which does not arise at present in this case. I pronounce against the claim of the lord of the manor, and decree the goods to be droits. The costs of the admiralty will come out of the property first, then the costs of the claimant, and the admiralty will probably not allow the salvors to go unrewarded.

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PETREL, Russell.

January 27, 1836.

Where a vessel under arrest for bail to the amount of a part owner's interest, and after a commission, to take bail, at the instance of the master — the other part owner, had issued — is removed by the master and others to Jersey, the court decreed an attachment against the master and mate, for their contempt, (and they were imprisoned,) and a monition against others to show cause.

ON 7th of August, 1835, a warrant of arrest, at the instance of John Durneston, of Brightlingsea, the owner of a moiety of the ship Petrel,

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having issued against The Petrel until bail shall have been given for her safe return to New Shoreham — her port, an appearance on the 19th of that month was given for David Russell — the master and owner of the other moiety, and a commission decreed for taking bail to answer the action; on the 31st of December this commission was returned — unexecuted — with a special certificate; and the proctor, for the master, declared that he proceeded no further for him.

On the 27th January, 1836, some affidavits and letters annexed, were exhibited, showing that on the 24th of August, while The Petrel was under arrest, and while in charge of the man on board as the officer of the court, she was forcibly taken possession of at [ \* 300 ] \* New Shoreham, by the master, mate, and several others; and that when under weigh, the man in charge was sent on shore, and the master and others took the vessel to Jersey, and that she there had been sold, and there remained.

Upon these affidavits and letters the King's Advocate moved for an attachment against the master of The Petrel; against Hubbard, the mate, and several others, on account of their contempt; and also prayed a new warrant of arrest against the vessel. It appearing, however, that the affidavits were not regularly sworn, the motion stood over, and on being repeated on the 16th of February, the court decreed David Russell, the master, and Thomas Hubbard, the mate, to be attached; and further decreed a monition against Matthew Russell the elder, and four others, two being his sons, (brothers of David,) to show cause why an attachment should not issue against them, "for contempt in forcibly taking possession of the ship Petrel, and in taking or causing her to be taken to sea, while under arrest of this court or for aiding and assisting therein."

No order was made as to a new warrant for the arrest of the vessel.

It appeared from the letters, (two of which were from Mr. Le Breton, attorney-general for the island of Jersey,) that in September, 1835, the ship had been arrested at Jersey for a debt; that such arrest was confirmed by the court, and the ship thereupon sold by the sheriff, and having been purchased by Matthew Russell the elder, was in his possession. The commissioners had, however, instructed their officers in Jersey not to register *de novo*, the ship.

\* On the 23d of April, Matthew Russell, the elder, and [ \* 301 ] Matthew Russell, the younger, petitioned to be dismissed from the effect of the monition.

SIR J. NICHOLL. This vessel, while in the legal possession of this court, was forcibly carried off in the night from Shoreham harbor to Jersey; and, under the suggestion of a debt due from the master,

was there sold by an order of the court of Jersey. An attachment has been decreed by this court against the master and the mate; and in answer to a monition against other parties as privy to the fraud of carrying off this vessel, affidavits of Matthew Russell the elder and the younger have been brought in; and the question is, whether they have purged themselves of a contempt of the process of this court. They are charged with an offence of great enormity — a great breach of the law, and a great violation of the rights of property, a species of theft and piracy. All parties who conspired to effect this violence are guilty of contempt; it is not confined to those who actually carried off the vessel, but it includes all who were privy to and assisted in the transaction. Who then are the parties? Is there not sufficient ground to suspect that all these Russels — the father and three sons — were privy to, and conspiring in the plan of carrying off this vessel? They were all at Shoreham on the evening of the 24th. It is not attempted to be denied that David was there; he had slept on board every night; and Dowley, the person in possession as officer of the court, says he saw him and his father conversing together on the evening of the 24th, \* and that when he was put on shore, [ \* 302 ] Daniel, another of the sons, assisted the boat over the beach. As regards Matthew Russell, the father, his affidavit contains no denial of the principal points; and though the letter of the attorney-general of Jersey is not sufficient to fix on him that the charges are true, yet it is sufficient to induce me to call upon him to answer to them, and to exonerate himself from the imputation of fraud and conspiracy. He is the ostensible purchaser of this vessel at Jersey; is in possession of her, and he ought, therefore, as is expressed in Mr. Lee Breton's letter, to bring her back to this country. Before, then, he can be held not liable for a gross contempt in the fraudulent removal of this vessel from the proper possession she was in at Shoreham, he must restore her or give bail. The proceedings in the Royal Court at Jersey seem singular; but it is impossible that it could have been aware that this vessel had been arrested and was under the authority of the High Court of Admiralty, and had been forcibly taken possession of when it left Shoreham; these are facts of which I must presume the court of Jersey, when it confirmed the arrest there, was ignorant; that, however, is a different question. But unless Matthew Russell, the elder, can show that he was no party whatever to this contempt, I shall enforce the monition against him. In regard to Matthew Russell, the younger, he denies being actually on board when the vessel was carried off; but although he does not expressly swear that he was not privy to and was not well aware of what was going forward, I incline to dismiss him.

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[ \*303 ] \* The *King's Advocate* interposed and said, he was instructed to object to the dismissal of Matthew Russel, the younger; and he further stated, that he was informed that the vessel, without a new register, had been taken to Cherbourg.

The court then addressed the elder Russell— You, at least, can bring in the money or give bail: I act with forbearance in not now committing you.

November 23. Hubbard, the mate, was arrested in September;<sup>1</sup> and on this day he petitioned for his release, stating that he had a sick wife and an aged mother dependent upon him for subsistence, and that he acted, in ignorance, under the master's orders.

The court was also again moved to decree an attachment against Matthew Russell, the younger.

SIR J. NICHOLL. [After a recapitulation of the proceedings and other facts.] For this offence the mate has been imprisoned for two months: he now applies by memorial, verified by affidavit praying to be released: he acknowledges his misconduct: and his release is not opposed by the party at whose prayer he was attached. The offence, however, is one of great enormity both against the public, and against the private individual—the part owner. As against the public, the offence is not merely a contempt of the process of the court, but it will increase the expense of suitors, if it should thus become

[ \*304 ] necessary to do more than put an officer into \*possession; it would render it necessary either to put on board a number of persons to secure the arrest, or to dismantle the vessel and disable her from going to sea. As against the individual suitor, it is little short of robbery; the vessel has been carried away, and he has been thus forcibly and unlawfully deprived of half her value. As far, however, as this mate is concerned, the law has done sufficient to assert its authority, and to deter others, by the example, from being guilty of the like offence. And it may be true enough, as the man swears, that he was ignorant of the offence he was committing: he acted under the directions of the master; but whoever obeys unlawful commands must take the consequences. However, there is no prospect that a longer detention of this man will tend to recover the possession of the vessel; if indeed it should ever come into a British

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<sup>1</sup> Matthew Russell, the elder, was not arrested until February, 1838.

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port she may possibly be liable to re-seizure, as it would, I think, be difficult, under the circumstances of this vessel, to make out a good title to any purchaser against the legal possession of the Court of Admiralty ; and from which possession she was forcibly and fraudulently removed. Let the usual steps be taken for releasing the mate.

In regard to the attachment against Matthew Russell, the younger, I reject the motion; the application should have been sooner followed up; and he is not one of the principal offenders.

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\* TEST, BROWN. (1.)

[ \* 305 ]

January 27, 1836.

Suit for wages (2*l.* 5*s.*) dismissed as premature, and within the jurisdiction of a magistrate, by 5 & 6 Will. IV. c. 19.

In answer to a suit by Small, a mariner, for wages, a defensive allegation, by the owners, pleading a month's forfeiture, for refusing to work, and for quitting the ship without leave before the cargo had been delivered, was now offered. The demand was 8*l.* 8*s.* 6*d.*, and a tender of 5*l.* 3*s.* 6*d.* had been made.

*Addams*, for the mariner. The tender is not enough: the man was hired at the Cape at 2*l.* 5*s.* per month, and the hiring took place before the 5 & 6 Will. IV., c. 19, was known at the Cape. Whether under the old or new law a forfeiture has been incurred; but the penalty to be enforced is under sect. 7, of the present statute, and the man's offence only amounts to a temporary absence.

*King's Advocate, contra.* The forfeiture is of a month's wages for not remaining on board till after the delivery of the cargo. The seaman also should have applied to a magistrate, for by 5 & 6 Will. IV., c. 19, ss. 15 and 16, there is a summary jurisdiction under 20*l.* If, therefore, the court should be of opinion, that the seaman could have sued under the new act, it will certify so as to oust him of costs.

*Addams.* It was a doubt under which statute the case should be brought, and on that account the man did not apply to a magistrate.



SIR J. NICHOLL. This question is of some importance :  
 [ \*306 ] I will \*state the proceedings. On the 18th of December an action was entered in 150*l.*, on the 24th bail was given, and on the 29th the mariner's contract and ship's books were brought in, and also the summary petition. That petition alleges the hiring at the Cape at 2*l.* 5*s.* per month, on the 14th of August the signing of the articles, and the arrival of the ship in the London Docks on the 8th of December, and that he was ordered on shore. The mariner's contract, or articles, confirms the time of shipping, the signing, and the rate of wages. This contract is important, it binds both parties, the owner, and the seaman ; it stipulates, that "the seaman is not to demand or be entitled to wages until the cargo is delivered, nor in less than twenty days in case the seaman shall not be employed in the delivery." And there is this further clause, that he is "not to sleep on shore during the delivery of the cargo, but to assist in delivering it by day, and in keeping watch by night;" these are conditions which the man admits that he has signed. Now the Merchant Seaman's Act, the 5 & 6 Will. IV., c. 19, received the royal assent on the 30th July, 1835 ; it repeals all the former acts on the subject, but contains a proviso, at the end of the first clause, as to penalties and forfeitures which shall have been previously incurred. The 15th and 16th sections are very important as respecting the recovery of wages under 20*l.* ; and the object of the legislature was, undoubtedly, in such a case as this, to enforce a summary proceeding.

It appears that on the very day this vessel arrived, the mariner came on shore, (he does not suggest any leave,) and on the [ \*307 ] next day he \*returned on board to know whether he was wanted, but he did not offer to work ; and he alleges that the master ordered him on shore. The entry of the log is, that "he refused to assist in the clearing up the deck, and left the vessel without leave." Yet he, notwithstanding the statute, notwithstanding his own express contract, immediately instituted this suit. I am of opinion, that from the time that the contract and the ship's books were brought in, he should have been considered out of court by his own agreement. I shall certainly not allow the owners to be put to further expense, and I dismiss the suit as *coram non judice*. There is nothing in the case but what might have been disposed of by a magistrate.

## TEST, Brown. (2.)

January 27 and April 18, 1836.

**Wages.** Claim by the owners for a deduction, on three grounds:—1. Refusal to work; 2. Embezzlement; 3. Quitting without leave, before the cargo was discharged. Form of pleading in such a defensive allegation. Wages decreed, with costs.

THIS was a suit by Clint, a foreigner, for 70*l.*, as balance of wages. The action was entered on the 18th of December; and, bail being given, a summary petition was brought in on the 29th, and on the following day witnesses examined upon it. The ship's articles and log-book were also in the registry. The articles described the brig as "bound for the Cape of Good Hope, and finally to return to some port in the U. K."<sup>1</sup> \* The summary petition alleged, [ \* 308 ] that Clint had signed at Liverpool the articles, on 6th of February, 1834, as carpenter, at 4*l.* 3*s.* per month; and that in the course of the voyage the brig was twice at the Cape, and was at Algoa Bay and Plattenbury Bay, and finally arrived in London on the 8th of December, 1835, (having earned considerable freight,) and that on the following day he was duly discharged. On the 13th of January a defensive allegation was brought in. It stood over with a view to an arrangement, but now came on for debate. The 1st, 2d, and 5th articles, and part of the 4th, in italics, were rejected; and of the 4th, the first part was compressed. The allegation pleaded:—

1. That the ship *Test* being at Liverpool, bound on a voyage to the Cape of Good Hope with a cargo, and elsewhere in search of freight, and then to return to some part of the United Kingdom, on the 7th of February, 1834, Richard Brown, the master, shipped and hired Peter Clint, as carpenter, to serve on board during the said voyage, and on the same day he executed the then usual mariner's contract or articles for the due performance of his duty as carpenter on board the said ship, for which he was to be paid wages at and after the rate of 4*l.* 4*s.* per month; that Clint, in and by the said articles or contract, contracted and agreed to and with Brown that

<sup>1</sup> Such vague terms have been frequently commented upon. See *The Countess of Harcourt*, vol. i. p. 248; *Minerva*, ib. 347; and *George Hume*, ib. 370. The 5 & 6 Will. IV., c. 19—the Merchant Seaman's Act, and known as Sir James Graham's Act—requires that the agreement in writing shall specify "the nature of the voyage in which the ship is intended to be employed, so that the seaman may have some means of judging of the probable period for which he is likely to be engaged;" sec. 2. There is a schedule of an agreement annexed to the act.

[ \* 309 ] \* he was to receive such wages, provided he well and truly performed his duty during the said voyage, and did not plunder, embezzle, or do any other unlawful acts on the said ship, cargo, and stores; that Clint did further contract and agree to and with the said Brown, that he would not demand, and should not be entitled to his wages, or any part thereof, until the arrival of the said ship at her port of discharge, and her cargo landed, or until after twenty days from her arrival at such port.

2. That on the 8th of February, 1834, the said ship sailed from Liverpool, and on the 12th of May following arrived in Table Bay, Cape of Good Hope, and having discharged part of her cargo, and having taken on board a further cargo, on the 26th of June following sailed from there for Algoa Bay, where she arrived on the 1st of July, and, having discharged her cargo, took on board certain goods free of freight, and on the 31st of July sailed for Plattenbury Bay, and arrived there on the 3d of August following; and, having landed such goods, took on board a full cargo of timber, oil, and other merchandise, sailed from thence on the 22d of October for Table Bay aforesaid, where she arrived on the 4th of November following; and having discharged such cargo, she remained there until the 23d of August last, when she sailed with a full cargo on her return home; and having put back into Simon's Bay, to repair certain damages received in heavy gales of wind, again sailed, on her return home, the 10th of September last, and on the 29th of the said month of September reached St. Helena, and, having there discharged part [ \* 310 ] of her cargo, \* sailed again on the 8th of October, and arrived at the London Docks on the 8th of December last.

3. That during the whole of the said voyage the said Peter Clint frequently misconducted himself, by disobeying the lawful orders of the said Richard Brown, the master, and by neglecting and refusing to perform his duty, and particularly from the 14th to the 22d days of May, 1835, when he absented himself from such duty, and refused to perform the same, although required to do so by the said master.

4. That during the outward bound voyage of the said ship, and her passage from Table Bay to Algoa Bay and back, there was on board a quantity of spirituous liquors, part of which was the private property of the owners, and the remainder thereof cargo; and that also part of the cargo shipped on board at the Cape of Good Hope, on her homeward voyage, consisted of wine; that William Forster (then mate on board) frequently embezzled and robbed the said owners of such spirituous liquors, and also broached and robbed the said wine, and was encouraged in so doing by part of the crew, particularly by the said Clint, in partaking of the said spirituous liquor and

## The Test. 3 Hagg.

wine with the said mate, knowing the same to have been so stolen by him, the said Clint having been seen to take the same, and having acknowledged he had so done; that on the return of the said ship to the port of London, on the 8th of December last, after the ship had been brought to and secured in the Eastern Dock of the London Docks, the said Clint complained to Richard Brown, the master, of being unwell, and obtained leave to go on shore to have medical advice, but \*with the understanding he was to [ \*311 ] return; and he accordingly went on shore for that purpose, but never afterwards returned, though fully able to have done so and to have performed his duty on board, and in consequence thereof Brown was obliged to hire, and did hire, a man to perform his duty in assisting to get the said ship into the dock of discharge in the said London Docks. *And the party proponent doth further allege and propound, that, by the conduct of the said Clint during the said voyage, in disobeying the lawful commands of the said master, in neglecting and refusing to do his duty on board the said ship, in partaking part of the spirituous liquors and wine, knowing the same to have been stolen, and his leaving the said ship after her arrival at the London Docks, without being authorized to do so, or receiving his discharge as pleaded and set forth in this and the preceding article, has forfeited all legal right or claim to the wages that otherwise would have been due to him.*

5. In part supply of proof, it referred to the mariner's contract and to the log-book, in the registry, and alleged that Clint executed the contract by signing by a mark, and that the contract was read, or the purport and effect fully explained to him, and that he understood the same.

*Addams* opposed the allegation.

*The King's Advocate, contra.*

SIR J. NICHOLL. The present allegation is defensive. In substance, the owners have a right to set up the defence it offers; but the question is, whether it is in proper form? It is the duty of the court to watch that no \*unnecessary matter be intro- [ \*312 ] duced. Every page, every sentence increases expense; such an allegation, therefore, should be limited to matter contradictory and responsive to the summary petition, and not be a repleader of it. Now the first and second articles repeat the facts that are in the summary petition, and I accordingly reject them as unnecessary. The allegation may, however, commence thus:—"Whereas, it is

alleged in the summary petition that, during the voyages therein set forth, the said Peter Clint did well and truly perform his duty as carpenter on board the said ship, and was obedient to all lawful commands;” and then allege as in the third, counterpleading in the usual form, with a reference, perhaps, to the log recording his absence from duty.

The 4th charges embezzlement, and may stand thus:—“ That during the voyage there were spirituous liquors on board belonging to the owner, and also wine, taken in at the Cape on the return voyage; that certain of the crew frequently embezzled parts of such spirituous liquors, and also broached some of the wine casks, and stole the said wine, and the said Peter Clint partook of the said spirituous liquors and wine, knowing the same to have been so stolen; and having been seen to take the same, he acknowledged he had so done.” The remainder, except the latter part, which pleads the legal consequences of misconduct, may then stand as a new article. The 5th I reject as unnecessary. The mariner’s contract is brought in; it is not contradicted, and it is alleged in the petition to have been executed by the mariner.

This allegation, thus compressed, is admissible, but what [ \* 313 ] will be its legal effect can only be properly \* ascertained when the whole case is before the court. The circumstances of this case are in some respects different from the last; but one circumstance in common is, that the action was entered before the time had lapsed that is allowed by law. There is this inconvenience in beginning suits so contrary to the articles, that it prevents parties coming to an amicable arrangement.

*Addams.* It has been usual where there has been an express demand and a refusal to pay, not to stop till the legal time has lapsed.<sup>1</sup>

On the 15th of February a responsive allegation, for the mariner, was admitted without opposition. It pleaded that his refusal to work at the Cape was owing to the repeated ill-treatment of the

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<sup>1</sup> By 5 and 6 W. IV. c. 19, s. 11, it is enacted, “ That the master or owner of every ship shall and he is hereby required to pay to every seaman entering into such contract as aforesaid his wages, if the same shall be demanded, within the respective periods following: (that is to say,) if the ship shall be employed in trading coastwise, the wages shall be paid within two days after the termination of the agreement, or at the time when any such seaman shall be discharged, whichever shall first happen; and if the ship shall be employed in trading otherwise than coastwise, then the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within ten days after the seaman’s discharge, whichever shall first happen,” &c.

mate, notwithstanding his promises to the master to the contrary; and that on the 21st of May, he (Clint) went on shore for legal advice, the effect of which was, that lest he might lose his wages, he returned to his duty on the 22d, and continued in it till her return to London, the mate having been discharged at the Cape. It denied the charges as to the wine and liquors, and alleged that at the Cape, the master having refused the mate and others, \* who [ \* 314 ] were there discharged, their wages, on similar charges, was compelled by legal proceedings to pay them; and in reference to his quitting the ship when in the docks, it alleged, that two days prior thereto he was taken ill with dysentery, and was duly discharged without any condition, and that entries thereof were made in the log.

Witnesses having been examined on these respective pleas, the cause now came on for hearing; the prayer on the part of the owners being for a reasonable deduction from the wages.

Of the two witnesses upon the summary petition, Podger, an apprentice on board, deposed, on cross-examination, in these words: "While in Plattenbury Bay, I saw a bottle of spirits in Clint's chest I did not see him partake of such spirits; he must have known the same to have been stolen by the mate or have stolen the same himself, for there was not any other spirits on board than what belonged to the owner or formed part of the cargo."

Lodge, the chief mate, upon the discharge of Forster, deposed to Clint being "a quiet steady man; and, though ill, thought he was equal to work; and that other hands were engaged." Brown, a surgeon, near to the London Docks, deposed that "on the 10th of December, Clint labored under dysentery and was very ill."

Counsel, as before, were heard on both sides.

SIR J. NICHOLL. The mariner, in this case, is a foreigner; he was in the employ of the owners for twenty-two months, earning wages to the amount of 92*l.* 16*s.*, subject to deductions of 22*l.* 14*s.* Three grounds \* of opposition are taken to the payment of [ \* 315 ] this balance; first, refusal to work for seven days at the Cape; secondly, embezzlement of stores; thirdly, a claim, by action before the wages were due. And the question is, whether there should be any deduction. The man, it is admitted, was quiet and inoffensive, and generally did his duty well; and I think that, under the circumstances, his disobedience of orders at the Cape is not to be pressed against him; it was while the master himself was on shore, and the ship in charge of Forster, the chief mate, who was so quarrelsome that he was there discharged with others of the crew; but Clint remained on board, and both before and afterwards, during a

long voyage, conducted himself properly. Upon this part of the case, then, there is not sufficient to induce me to make a deduction from his wages.

In respect of the charge of embezzlement, the whole proof is, that a bottle of spirits was seen in his chest; and it may have been there honestly; the proof, however, is certainly not enough to sustain the charge; and the master may be said to have cast this and the other charge into oblivion, for he takes a new crew on board at the Cape, and yet continues Clint in his service.

The third ground of defence is, going on shore before delivery of the cargo or a legal discharge; and properly and strictly, according to the articles, the man ought not to have quitted when he did; but his illness furnishes a reasonable and legal cause.<sup>1</sup>

[ \* 316 ] \* It was said that the claim, by action, was before the wages were due; and the action, perhaps, was entered too rapidly; but the court is not desirous of paying too much attention to that, for its object is to have expeditious proceedings, and in this instance, where the demand is large, and has been much contested, and where bail to the action was given without any thing in the nature of protest, I see no reason to make any deduction on that account. Upon the whole, then, I am of opinion that the man is entitled to recover the full balance of his wages, and with costs.

*King's Advocate* then applied for the schedule of deductions to be referred to the registrar, as the owners and mariner were not agreed upon the amount; but the application was refused.

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<sup>1</sup> In *M'Donald v. Jopling*, 4 Meeson & Welsby, 285, it was held by the Court of Exchequer, in a judgment delivered by Lord Abinger, C. B., that where a seaman, who has signed the articles of agreement required by 5 and 6 Will. IV. c. 19, absolutely quits the ship, without any *animus revertendi*, after her arrival and being moored at her port of delivery, but before her cargo has been discharged, he does not thereby incur a total forfeiture of his wages within the ninth section of that statute, but only of a month's wages, under section seven.

## THE CHESTER, LAWSON.

February 5, 1836.

A vessel with the wind beam on the larboard tack ran foul of and sank another close-hauled on the starboard tack. The former vessel condemned in damages and costs.

THIS was a suit for damage arising from collision. The circumstances are as follows:— At about midnight, on the 24th of August, 1835, the schooner Susan, of 146 tons burden, with a crew of seven men in all, on a voyage from Newport, in Monmouthshire, to Waterford, with a cargo of coals, was about twenty miles from the Hook \* Lighthouse, reaching in for the land, close-hauled [ \* 317 ] on the starboard tack, with the wind blowing strong from N. N. W., and showing a light, was struck upon the lee-quarter, by the ship Chester, timber laden, of 580 tons burden, with twenty-four men, then bound for Liverpool, and going up channel, with the wind on her beam, above eight knots.

On the part of The Susan, it was sworn that The Chester's bowsprit, after carrying away both masts and bowsprit of The Susan, dragged her stern foremost through the water, and although repeatedly hailed by the crew of The Susan to cut her adrift, and to shorten sail, neglected to do either, until, in order to save their lives, they were obliged to call for ropes and got on board The Chester; that The Susan was afterwards cut adrift and totally lost, although her master requested the master of The Chester to stay by her until morning. The rule requiring that a vessel on the larboard tack should steer clear of one on the opposite tack was relied on.

On the part of The Chester it was sworn, that the night was hazy, squally, and very dark; that two men were stationed forward, and one on the fore-yard, on the look-out, that the master had been three times aloft during the previous hour to look for the Waterford light, that most of the crew were aloft furling the fore-topgallant-sail, but that nothing was seen of The Susan until close on board of her; that the collision was unavoidable, and that it had been admitted on all hands, when The Chester arrived at Liverpool, to have been purely accidental; it was denied, that The Susan had been dragged through the water any longer than could be avoided; and it was asserted, that she had been cut adrift as soon as possible, [ \* 318 ] and that, owing to the state of The Chester's rigging, it was impossible to stay by The Susan.



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The Chester. 3 Hagg.

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*King's Advocate* and *Addams*, for The Susan.

*Phillimore* and *Nicholl*, *contra*.

SIR J. NICHOLL, (after recapitulating the facts.) The real merits of this case lie in a very small compass; if the facts as stated on behalf of The Susan be true, there can be no doubt where the blame lies, for it is not suggested that blame is imputable to the vessel run down, and even if carrying a light be a necessary precaution, it is positively sworn that there was a light on a conspicuous part of The Susan's deck; if she had seen The Chester it was her duty not to alter her course. The Chester admits that it was her duty to have kept a good look-out; and, going free, she was bound to steer clear of vessels close-hauled. It seems quite impossible that she should have kept a good look-out, otherwise this schooner, even without lights, but at all events with lights in her cabin and binnacle and, in truth, on deck, must have been seen; but she was not seen until the moment of the collision, and the shock, it appears, was at first thought on board The Chester to have been caused either by a sand-bank or a water-logged vessel. The master was anxiously looking towards the shore for the light, and the greater part of the crew were taking in the fore-topgallant-sail; the attention of those stationed to look-out was, probably, also directed to these objects; it is [ \* 319 ] an unfortunate case, but the damage seems to me to \* attach to The Chester from not having kept a good look-out; she was going eight, and The Susan was only going three knots an hour.

It will not be necessary to inquire into the circumstances which occurred after the collision, as to whether the master of The Chester was blamable in not cutting The Susan adrift sooner, or in not endeavoring to stay by her until morning; he declined to do either, on one consideration or another; but according to the view the court takes of the case, this further inquiry is not material.

Captain Timbrell and Captain Young, two of the elder brethren of Trinity House, then expressed their opinion that the collision took place from the want of a good look-out on board The Chester; when the learned judge added — I fully concur, upon the evidence, in that opinion; and I must, therefore, condemn the owners of The Chester in the damages and costs.

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The above decree was sought to be reversed for the following rea-

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The Jupiter. 3 Hagg.

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sons: Because it was fully proved that the night was so dark that the crew of neither vessel could see each other previous to their coming into contact; and that no negligence or want of skill was imputable to the appellants; but the Judicial Committee, without hearing the respondents, affirmed the decree with costs.

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\* JUPITER, Henck.

[ \* 320 ]

February 5, 1836.

If two vessels are beating to windward on opposite tacks, it is the duty of the vessel on the starboard tack to continue her course, and that on the larboard to give way.  
Action dismissed with costs.

THIS was a proceeding by a collier (The William Wilberforce) against a Prussian galliot for collision on the 29th of May, 1834, near to Shoe Hole.

For the collier it was alleged, that, the wind being N. E. by N., she was on the starboard tack, with several other vessels, when The Jupiter, on the larboard tack, neared her; that the master of the collier ordered her helm a-weather and to bear up, and perceiving The Jupiter did the same, hailed her to keep her luff; that the vessels came in contact, and the galliot struck the collier on the starboard bow and did her considerable damage. On behalf of The Jupiter it was alleged, that the wind was E. N. E., and she lay on the larboard tack, she bore up according to custom, to allow three sail, all in a line, on the starboard tack, to pass to windward; that two passed, but that The Wilberforce, when near, also bore up, though repeatedly hailed to keep her luff; and that both vessels wearing, they came in contact, and The Jupiter was much damaged.

The same Trinity Masters, as in the preceding case, attended.

*King's Advocate* and *Haggard*, for the collier.

*Addams* and *Nicholl*, *contra*. Not heard.

SIR J. NICHOLL. Both these vessels were beating to windward, but on contrary tacks, below the Nore; it was open daylight and the weather was fine. The \* Wilberforce was on the [ \* 321 ] starboard tack; she should, therefore, according to the well known rule, have held on her course; the first two vessels in the same

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The Celt. 3 Hagg.

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line had kept their course and passed clear, but The Wilberforce began wearing and occasioned the damage; there is no doubt she is to blame; yet a year after the transaction she has arrested this foreign vessel. The Trinity Masters are clearly of opinion that there is no ground for the action; and I dismiss The Jupiter with costs.<sup>1</sup>

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CELT, Taylor.

February 16, 1836.

Where the mismanagement of a vessel totally lost, was, in the opinion of the Trinity Masters, the blamable cause of the collision; but in their opinion, the master of the other vessel was also blamable, for not endeavoring to render assistance after the collision, the court decreed that the owner of that other vessel was not liable for the loss, but condemned him in the costs of the suit.

THIS was a suit brought by the owner of a schooner against the brig Celt, for damage and collision in the Irish Channel, where the schooner was lost. The court was assisted by Captain Stephenson and Captain Drew of the Trinity House.

The *King's Advocate* and *Nicholl*, for the schooner, contended that the collision arose from a want of good look-out, and from unskilfulness in the brig.

*Addams, contra*. That the schooner was in fault from having attempted to wear.

SIR J. NICHOLL. This case is not without its difficulties in some parts; but the assistance of the gentlemen of the Trinity [ \* 322 ] \* House will enable me to dispose of them. It is more satisfactory for me, in the first instance, to state my impression. The case arises under the following circumstances.

The schooner Anthony, of Yarmouth, of seventy-one tons, with a crew of five men, was proceeding with a cargo of pipe-clay on her voyage from Cornwall, to Liverpool, and about 7 P. M. of the 23d November, 1834, whilst working up the Irish Channel, close-hauled on

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<sup>1</sup> Upon the same rule, (Capt. Young and Capt. Welbank, Trinity Masters,) the *IX Martz* was dismissed with costs.

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The Celt. 3 Hagg.

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the starboard tack, with the wind from E. by S. to E. S. E., the weather dark with rain, and the Tascar rock bearing N. E. by N., distant about fifty-one miles, discovered the brig Celt, of 216 tons, bound from Greenock to Trieste with sugar, coming down before the wind, steering about W. S. W., with all sail set, going about  $6\frac{1}{2}$  knots. The Anthony immediately showed a light, which was seen on board The Celt by the carpenter, on her larboard beam; and he gave notice to the man at the helm; this notice was repeated, and soon after the collision took place.

Thus far the parties are pretty well agreed as to the facts. Here is one vessel close-hauled and beating to windward, and the other with the wind free and all sail set, and if it had been open daylight it would have been *prima facie* the duty of The Celt to have kept clear of The Anthony, and of The Anthony to have kept on her course. As to the other circumstances of the case, which the court will presently consider, the parties differ materially in their statements, but it seems to be admitted, that, upon the collision, the crew of The Anthony came on board The Celt and remained there without returning to their own vessel; that the vessels soon separated; that The \* Anthony has never since been seen or heard of; [ \* 323 ] that The Celt, after a short delay for the purpose of putting her rigging to rights, proceeded on her voyage with the crew of The Anthony; that, off the coast of Ireland, this crew was put on board in a boat, and landed without clothes or money, whence they made their way to Yarmouth, where the master entered his protest on the 6th of December following. The Celt afterwards returned from the Mediterranean, and refusing to make any compensation, was arrested in *this suit* in October last, and bail given in 1000*l*.

The question then, is, which party is to blame either for the collision, or for their subsequent conduct. The protest of the master of The Anthony is confirmed by three of her crew, and was made whilst the facts were recent; and though they may have an interest arising from the loss of their clothes, they are witnesses *ex necessitate*, and even in more formal proceedings, might easily be rendered competent by releasing their interest.<sup>1</sup> The affidavits of the master and crew of The Celt come in, a year after the occurrence, for the purpose of denying the charge imputed to them; and since both parties may be considered as disposed to make the best of their case, I must rather rely on the nautical knowledge and judgment of the assessors to discover on which side the story told is most credible.

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<sup>1</sup> See Catherine of Dover, 1 Hagg. A. R. p. 145.

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The Celt. 3 Hagg.

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The protest states, that the master of The Anthony "being at her helm, discovered a brig coming down right before the wind in a line, ahead of The Anthony, distant, as he believes, about half [ \* 324 ] \* a mile, upon which the appearer lighted a lantern and showed it upon his lee bow, and afterwards on his weather bow ; that the brig was under a press of sail, with lower and topmast studding-sails, and neared him fast, but did not alter her course, and all the crew of the appearer's vessel, who were on deck, joined in hailing her to port her helm, to which no reply was made, and the brig kept her course ; and being so near that he found the brig would strike him end on if he continued his course, he endeavored to get his vessel before the wind, and put his helm a starboard, and lowered the peak of his mainsail ; but before his vessel could veer and get before the wind, the brig, going at the rate of about seven knots, struck the appearer's vessel." The damage is then described ; and it is not material whether the brig struck with her cutwater or bow, except as to the accuracy of the protest.

What answer is given to the account in the protest ? The carpenter of The Celt says, that " having walked aft as far as the main hatch, he observed a light about two points before the larboard beam, abaft the lower studding-sail boom end ; " so that here it is admitted, that the light was hung out and seen ; " that he gave notice thereof to Leitch, the man at the helm, but that he could not discover whether the light was on board a steamer or sailing vessel, it being impossible to to distinguish any sails on board the vessel carrying the light, or to form an idea of the distance thereof from the brig ; " so that he admits the brig did not change her course when she first saw the [ \* 325 ] light ; " and the deponent having \* returned to the forecabin, observed that the light neared the brig, he and others called to Leitch to put the helm a-port, which being done, the brig veered about five points to the westward of her course, when a vessel under sail was observed by the deponent from the starboard side of the brig with the peak of her mainsail lowered, and in the act of wearing ; that in less than a minute after she was so observed, the schooner came in contact with the brig, with the heads of both vessels before the wind, that the foreyard and lower studding-sail boom caught the forerigging of the schooner and were broken, and the lower studding-sail torn ; that shortly afterwards the hulls of the vessels came in contact about the fore chains, but the concussion was so slight that the shock was not perceived by the deponent ; " and that might happen from the size of the brig ; but the damage shows that the vessels must have come in contact with considerable force.

The mate's affidavit was made on the 23d of December, and it

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varies from that of the carpenter; for he says, "that upon noticing the light to the steersman, he immediately put the helm a-port, and the brig veered about four points to the westward of her course;" but if the carpenter is correct, this is not until the second notice. Again, the master, whose affidavit bears date on the 14th of January, says, "the light was discovered, and almost immediately afterwards a vessel was observed by the carpenter with the peak of her mainsail lowered, and in the act of wearing." Seeing the schooner, therefore, and the collision, occurred, according to the master, almost at the same instant; and he does not support the carpenter, nor even the mate, \*upon that main fact of the brig altering [ \*326 ] her course in order to avoid the schooner. Such are their respective accounts; and if the court can once establish on which side there is veracity, it will have less difficulty in ascertaining where is the blame.

Upon these statements some observations arise. Lights were hung out on board The Anthony, and those lights observed from The Celt; but, according to the carpenter, upon the first notice given to the steersman, nothing is done to avoid the collision; and The Celt did not take any measure to avoid the collision until she was so near as to observe The Anthony's peak lowered, and that vessel was already attempting to go to leeward. An interval, therefore, had elapsed, after the light was first discovered; and it is a question for the Trinity Masters whether The Anthony was justified, when she found that The Celt did not alter her course, in endeavoring to wear out of her way? In the next place, would a vessel coming down before the wind, and seeing a light proceeding from a vessel on her beam, be unable, under the circumstances, to discover the course in which that light was proceeding, so as, at least, to endeavor to avoid it? for whether it were a steamer or a sailing vessel, it was equally the duty of a vessel going free to have avoided her, and not to wait until close upon the light before she ported her helm.

Such appear to me the most essential parts of this case; but in reference to what happened after the collision, it is suggested in the affidavits, on behalf of The Celt, that the master and crew of The Anthony quitted their vessel unnecessarily, and got on board The Celt, whereas, in the protest, it is sworn that the master of The Anthony applied to \*the master of The Celt to try [ \*327 ] whether something could not be saved from the schooner, but that he refused, saying that the schooner was in a sinking state, and he should proceed on his voyage. The whole question, however, is more for practical men than for a judicial determination; and I have not so decided an opinion on the subject as not readily to

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yield to the one which the gentlemen of the Trinity House may form.

Captains Stephenson and Drew then retired, and returned with a written joint opinion, which the senior read, and which stated, in substance:—1st, That the collision would not have taken place but for a want of skill on the part of the schooner; that as she was close-hauled, she ought to have continued on her course, and not have attempted to wear. 2dly, That after the collision, The Celt was blamable in not having attempted to ascertain whether some assistance might not have been rendered towards saving the schooner.

After the Trinity Masters had expressed their opinion and withdrawn, the counsel for the schooner submitted, that, where both parties were blamable, the damage ought to be shared; but the court was of opinion that, the collision itself being imputable to the schooner, the defendant was entitled to be dismissed; but it directed the entering of the decree to stand over, that it might be ascertained whether there was any precedent respecting the legal effect of subsequent misconduct, as in the present case.

No precedents in such a case, of an apportionment of damage or otherwise, was produced; and on the 23d of March, the court [ \* 328 ] having adverted \* to the rule laid down by Lord Stowell, in *The Woodrop Sims*, (2 Dod. 83,) when both vessels are in fault, as inapplicable to the present case, the following decree was entered:—

That the collision set forth in the act on petition took place through the unskilful conduct of the master and crew of the schooner Anthony, and that the owner of the ship Celt is not liable for the damage thereby sustained; but the master of the ship having, after the collision, neglected and refused to render assistance to the schooner, and having sailed away and proceeded on her voyage, carrying the master and crew of the schooner on board the ship, and afterwards landed them in a state of destitution on the coast of Ireland, condemned the owner of The Celt, and the bail given on his behalf, in all costs and expenses of this suit.<sup>1</sup>

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<sup>1</sup> Mr. Serjeant Shee, in his edition of *Abbott on Shipping*, p. 202, says, The rule of equal division, where both parties are to blame, has been solemnly recognized by the House of Lords in *Hay v. Le Neve*, 2 Shaw's Scotch Appeal Cases, 395. See also *De Vaux v. Salvador*, 4 Ad. & E. 431.

The rule was also acted upon in the case of *The Monarch*, Bell, master, (June 23,

\* DUNVEGAN CASTLE, Howard. (1.) [ \* 329 ]

February 16, 1836.

Application by the master to receive out of proceeds wages to seamen who had died on the voyage, and which, under 4 & 5 Will. IV. c. 52, s. 30, he was called upon to pay to the Seaman's Hospital.

ADDAMS moved for a warrant of arrest, at the instance of the late master of the above ship, against the proceeds arising from the sale of the ship, and remaining in the registry, for the recovery of the wages due as to three men who had died on the voyage—the Seaman's Hospital had demanded them. He cited 4 & 5 Will. IV. c. 52, s. 30, by which the master was liable to pay double the amount of wages, if he neglected to pay them within three months after the ship's arrival. The hospital looked to the master for the payment; the warrant was therefore necessary for his protection; and the application was consented to by the proctors for the bondholders and the mortgagees.<sup>1</sup>

SIR J. NICHOLL. This is the first application under the statute, and the court is desirous of protecting the master. Though he cannot sue in his own right for his own wages, yet he is now rather in the character of substitute for the Seaman's Hospital, and ultimately for the benefit of the next of kin of the deceased seamen. The vessel has been sold in a suit for wages, and several men have been paid; and both the bondholder and mortgagees admit that wages are a primary lien, and acquiesce in this application. My doubt is, whether, before the master receives these wages, there should not be \* the consent of the Seaman's Hospital, as well as of the [ \* 330 ] bondholder and mortgagee.

The registrar having then suggested that the payment could not be

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1838,) where, in a suit by the owner of a fishing boat that was struck by The Monarch steamer, and sunk, and one of the crew drowned, Sir John Nicholl concurred with the Trinity Masters that both parties were to blame.

In The Nancy, Fauteuil, master, (February 6, 1827,) there were, it was stated, cross actions, (The Eleanor also being much damaged;) and the court, assisted by Captain Drew and Captain Locke, Trinity Masters, held that the collision was accidental, and that each party should bear his own loss.

\* \* In the above case of The Nancy, a prayer was made by the proctor of The Eleanor, that he might be allowed to increase the amount of the action by him first entered as against the owner of The Nancy, for the purpose of covering consequential damages.

<sup>1</sup> See the next case.



## The Dunvegan Castle. 3 Hagg.

safely made without an appearance for the representative of the owner, the court directed the motion to stand over.<sup>1</sup>

[ \* 331 ]

\* DUNVEGAN CASTLE, Howard. (2.)

April 18, 1836.

A bottomry bondholder had advanced money *bond fide*, but with knowledge of a previous mortgage of the ship, and of all the other circumstances; the bond was executed by the executor of a deceased sole owner, who had already made the necessary advances, and who had himself ample credit, and by the master who had been appointed by such executor; the bond, opposed by mortgagees, pronounced against, without costs.

*Quere* — Whether, if the proceeds had been sufficient to satisfy the mortgage and the bond, such bond would not have been good as against the executor?

R. L. LAWS being desirous of purchasing this ship, borrowed, in January, 1834, of Messrs. Groves and Nicholas, of London, 2,000*l.* on

<sup>1</sup> SPECULATOR, Benest.

May 1, 1832.

Wages due prior to 1 Will. IV. c. 25, paid out of the proceeds of a derelict, condemned as a droit of admiralty.

IN July, 1830, the admiralty proctor, instructed by the admiralty, had entered two actions of wages against this ship, on behalf of the late carpenter and a seaman, who had been left by the master at Hamburgh, and sent home by the British consul pursuant to 1 Geo. II. s. 2, c. 14, s. 12. Before the warrants of arrest could be served, the ship had sailed; she was afterwards found a derelict at sea, and upon being towed into Selsea, the admiralty proctor there arrested her, and she was condemned as a droit of admiralty on the 9th of September, 1831. The 1 Will. IV. c. 25, had then passed, enacting that the produce of the hereditary casual revenues arising from any droits of admiralty should be made part of the consolidated fund. And in the 12th section it is enacted, that nothing therein contained shall affect certain rights or powers which have been or may be exercised by authority of the crown, or other lawful warrant, as therein specified. (See 6 & 7 Will. IV. c. 60, s. 7.)

Upon this statute, a doubt arose whether any part of the proceeds could be applied in payment of the wages and value of the tools and clothes of the two men. The claim was for 23*l.* 7*s.* 4*d.* The proceeds were 72*l.* A memorial was before the treasury for the balance, to be applied towards satisfying a bond in the nature of bottomry. On the 18th of April, 1832, the court, upon the affidavits that led the warrants, was moved on behalf of the seamen, when a further affidavit in verification of their demand was required. This affidavit was made by Mr. Jones, the solicitor to the admiralty, and on the 1st of May Sir Christopher Robinson ordered the amount to be paid out of the proceeds.

mortgage of the ship, for the purpose of completing the purchase. The mortgage deed was dated the 17th of January, 1834, contained a proviso for redemption, was duly recorded in the books at the custom-house, and indorsed on the ship's register, pursuant to 6 Geo. IV. c. 110.<sup>1</sup>

The ship sailed under the command of Laws for Calcutta, where she arrived on the 6th of July, 1834, having earned upwards of 2,000*l.* freight by the voyage. Messrs. Lyall & Co., of Calcutta, were Laws' agents, and with his concurrence and that of this firm, she began loading a cargo of rice for the Mauritius; before she was fully laden, Laws died, on the 1st of August, 1834, having made his will, appointing Robert Lyall, the senior partner, sole executor, who forthwith proved the will at Calcutta. Lyall & Co. having, by a correspondence with Cockerell & Co., the agents of Groves & Nicholas, been fully informed of all the circumstances of the mortgage, completed the ship's lading, and sent her to the Mauritius under the command of Crisp Howard, formerly chief mate under Laws, whom they appointed as master; she returned to Calcutta with a cargo of salt on the 5th of February, 1835, and Lyall & Co. received the whole of her earnings on these two voyages. They then thought it advisable to send her to England on freight; and

\* they accordingly made the necessary advances of money [ \* 332 ] to enable her to clear for sea, which she did on the 8th of

April, 1835, and having applied to Cockerell & Co., the agents of the mortgagees, for an advance of money, which was refused, having also received bills on England for the freight to the amount of 1,400*l.* from the shippers, (agreeably to the usage of the East India trade,) they on the 13th of April advertised for a loan of money on bottomry, which was obtained the same day of Mr. William Dalrymple Shaw, who advanced 1,728*l.* at twenty per cent. on the joint bond of Lyall (who executed it as "the executor of R. L. Laws deceased") and of Howard the master. Shaw, at the time he advanced the money, was aware of all the previous circumstances relating to the ship. The ship arrived at London on the 30th of September, 1835. The freight of this last voyage having been paid at Calcutta to Lyall & Co., and the estate of Laws, the former owner, proving insolvent, the crew proceeded against the ship in this court and she was sold. The net proceeds now remaining in the registry were 1,050*l.*, and they were insufficient to satisfy either the bond or the mortgage. It appeared

<sup>1</sup> See 3 & 4 W. IV. c. 55, s. 42.

that Lyall & Co. had applied the various sums received by them for freight to discharge certain debts which Laws had incurred to them.

The *King's Advocate* for the mortgagees. The bond is bad, a considerable portion of it having been applied to fit the ship for the voyage to the Mauritius and back. There was never any necessity for having recourse to bottomry, for the freight which Lyall [ \* 333 ] & Co. had received (to the \* detriment of the mortgagees as specialty creditors of the estate of Laws) was an available fund; there was no application for money on bottomry until the whole of the lading was completed, the master was a servant of Lyall & Co., and the bond was merely to enable that firm to obtain priority of payment for a simple contract debt.

*Phillimore*, for the bondholder. The bond is good in part, and the court will therefore refer it to the registrar and merchants. The ship not having sailed until the 13th, although she cleared on the 6th, will not affect its validity. The only question for the consideration of the court is, whether the lender acted *bonâ fide*, and there never was a stronger case of *bona fides*. Lyall & Co. had no other means of obtaining the necessary funds, for an executor is not bound to give credit beyond what the testator's estate is sufficient for; the mortgagees may have recourse to equity, but their claim cannot prejudice, in this court, the right of a *bonâ fide* lender on bottomry. He cited *Ysabel*, 1 Dod. 273; *Augusta*, ib. 283; *Tartar*, 1 Hagg. Adm. R. 11, 14; *Zodiac*, ib. 320; *Portsea*, 2 Hagg. 84.

SIR J. NICHOLL, (after stating the circumstances of the case and the pleadings.) How can I hold that this bond supersedes the mortgage which, by the 6 Geo. IV. c. 110, ss. 45, 46, is valid against all creditors, even in case of bankruptcy? It can only be defeated by a claim for wages or by a bottomry bond executed by a master in case of absolute necessity—strict necessity arising on a voyage. Here there was no necessity, for Lyall, as executor of Laws, was [ \* 334 ] the legal \* owner of the ship, and was in ample credit. At the time the bond was given, Lyall & Co. were only simple contract creditors. Besides, Howard was raised by Lyall & Co. from mate to master; and while at Calcutta he had no separate power or control over the ship, but was their servant, acting under their authority.<sup>1</sup> He and Mr. Lyall executed the bond the day before the ship

<sup>1</sup> In *The Kennersley Castle*, *supra*, p. 1, and *Rubicon*, p. 9, bonds were given by substituted masters.

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The Eliza Jane. 3 Hagg.

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sailed, and the rate of interest was high. Shaw, the lender, ought to have inquired into all the circumstances; for in these cases the maxim of "*caveat emptor*" applies.<sup>1</sup> Money was abundant at Calcutta; in fact Lyall and Co. had already made all the necessary advances, and he had nothing to do but to despatch the ship. This is not a case arising between two bonds, in which the second would over-ride the first:<sup>2</sup> this bond might possibly be good as against Lyall as a species of second mortgage, and if there had been a large surplus, after the discharge of the mortgage and the bond, Lyall might perhaps under the circumstances have been allowed to receive such surplus, but it is admitted that there are not sufficient funds to discharge either the bond or the mortgage. I am satisfied that this is not a bottomry bond such as I can sustain; and I pronounce against it, but without costs.

I do not know of any difficulty in directing the proceeds to be paid out to the mortgagees; but as there is a question pending before the Court of Chancery, I shall prefer waiting for [ \* 335 ] some order of that court before this is done.<sup>3</sup>

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ELIZA JANE, Findlay.

April 23, 1836.

Appearance under protest, in a cause of collision, on the ground that it was *infra corpus*, overruled. Suit ultimately decided on prohibition.

A WARRANT having issued in a cause of collision, at the suit of the owner, master, and crew of The Mary Anne, to arrest The Eliza Jane, an appearance under protest was given for Mr. Carfrae, one of her owners, alleging that the collision did not occur within the jurisdiction of the Admiralty Court, but at about four miles below the Lower Hope, near to Hole Haven, within the jurisdiction of the Court of Conservancy of the city of London, and of his Majesty's courts of common law.

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<sup>1</sup> See The Orelia, *supra*, p. 75, and Heathorn v. Darling, 1 Moore's Privy Council Cases, p. 5.

<sup>2</sup> See The Eliza, *supra*, p. 89; The Rhadamanthe, 1 Dod. 201.

<sup>3</sup> See 3 & 4 Vict. c. 65, s. 3.

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The Eliza Jane. 3 Hagg.

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For The Mary Anne, the jurisdiction of the courts of conservancy and of common law was denied, and it was alleged, that the collision did occur within the admiralty jurisdiction, to wit, in five and a half fathoms of water, at or about half a mile above Leigh, on the coast of Essex, and six miles and a half below the Hope Point, and three and a half miles below Hole Haven, and two miles below the boy on the Chapman sand.

Upon the protest being argued, *Nicholl* admitted that the collision took place above Yantleet Creek on the one side, and the London stone on the other side, of the river; and within the jurisdiction of the Court of Conservancy.

*Addams*, for the protest. The collision being within the [ \*336 ] jurisdiction of the Court of \* Conservancy, the admiralty jurisdiction is ousted; and in support of that argument, he adverted to the charter of King James I., as to the Court of Conservancy,<sup>1</sup> and to the case of *Rex v. Montague*, summer assizes, at Guildford, 1824, before Baron Graham, and printed as the Yantleet Creek case, and to *The Eleanor*, 6 Rob. 39.

*Nicholl, contra*. The collision took place *infra primos pontes*, and therefore, *primâ facie*, within the general jurisdiction of the admiralty. The width of the river makes no difference, nor that the collision happened between two counties. The *onus* is on the other side, to show that the admiralty jurisdiction is ousted: the locality being within the jurisdiction of the Court of Conservancy will not have that effect; for the jurisdiction of the admiralty court and courts of common law may be concurrent. *The King v. Bruce*, (Milford Haven Case,) 2 Leach Crown Cases, 1093.

*Addams*. The case of the *King v. Bruce*, was under the statute of Henry VIII., (27 Hen. VIII. c. 4,) which provided for the criminal jurisdiction of the admiralty.

SIR J. NICHOLL. If it clearly appeared to me that the Court of Admiralty had no jurisdiction, I should not wait for a prohibition, but should prohibit myself; for it is due to justice not to allow parties to incur fruitless expense; but, before I prohibit myself, I must be satisfied that this court has no jurisdiction. The Court of Admiralty has, *primâ facie*, a general jurisdiction from the lowest [ \*337 ] bridges down to the sea; though there possibly may be a

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<sup>1</sup> See 1 Maitland's London, p. 60.

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The Eliza Jane. 3 Hagg.

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concurrency of jurisdiction or even an exclusive jurisdiction in the Court of Conservancy, which may oust the admiralty jurisdiction, but until that is clearly made out, I shall not sustain the protest. In the *Eleanor*, (6 Rob. 39,) the court said it would not dismiss the parties, until all the circumstances were before it, so, in this case, I am disposed to pursue the same course, and at present to make no order. Another part of the protest is, that a licensed pilot was on board; but that is matter of defence, and properly, therefore, has not been adverted to in argument. It depends upon an act of parliament, which is of difficult construction, as regards the jurisdiction of this court.

On the next session, *Addams* argued that there was no concurrency of jurisdiction, and cited 13 Ric. II. c. 5, 15 Ric. II. c. 3, and *Velthasen v. Ormsby*.<sup>1</sup> In *The Eleanor*, he said, the question was not as to a concurrency of jurisdiction. In *The Public Opinion*, it was argued, that there might be a concurrency of jurisdiction.<sup>2</sup> He referred to the 1 and 2 Geo. IV. c. 75, s. 31, as giving a concurrency of jurisdiction, but only in salvage, between high and low-water mark.

*Nicholl, contra*. The Court of Conservancy has only ordinary jurisdiction in matters of police; and it may extend so as to come within, but not so as to oust, the admiralty jurisdiction. *Velthasen v. Ormsby* was *infra corpus comitatûs*, and I admit, that if the collision in this case had been \* *infra corpus*, the jurisdiction of the admiralty would be gone. In the case of *The Solent Sea*, cited in *The Public Opinion*, it may have been concluded, that the collision was *infra corpus comitatûs*, and the point given up; but this court, before it would oust its own jurisdiction, would consider on what principle a prohibition could proceed. In *The Public Opinion*, Sir Christopher Robinson entertained some doubt; and some doubt was also entertained by the bar; and in that case, the learned judge said, he would not go beyond the known jurisdiction of the court, and dismissed the suit. The *onus probandi* is on the other side; and the case and argument in support of the protest do not show that the admiralty jurisdiction is ousted.

The cause again stood over; but there being no notice of a prohibition, the court, on the 10th of May, overruled the protest, and directed the owners of *The Eliza Jane* to appear absolutely.

On the 23d of May, 1836, R. V. Richards obtained a rule to show cause why a writ of prohibition should not issue, and on the 11th of

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<sup>1</sup> 3 Ter. Rep. 315.

<sup>2</sup> 2 Hagg. Adm. Rep. 398.

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The Sussex. 3 Hagg.

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June, it was ordered that the owners of The Eliza Jane should declare in prohibition; and upon that being done, the defendant pleaded "that the collision did not take place out of the jurisdiction of the Admiralty Court," whereupon issue was joined, and the cause tried at Guildhall, on the 7th of July, 1837, when a verdict was found for the plaintiff.<sup>1</sup>

[ \* 339 ]

\* SUSSEX, Roxby.

April 30, 1836.

The court will stop salvors under a decree of appraisement, (after bail has been given,) from unloading the cargo at an outport. 2,100*l.* allotted for salvage.

THIS vessel, which, with her cargo and freight, was estimated at 10,500*l.*, was met with off Ushant, reduced to a mere hull, and without the means of getting into port, by The Ariel, an outward bound south sea whaler — herself so much damaged as to require to go into port to refit — and by her towed 480 miles in the course of four days, and brought up at the Mother Bank, from whence she was taken into Cowes.

An action having been entered on behalf of the master, owner, and crew of The Ariel, in 8,200*l.*, the proctor for The Ariel applied on the 8th of April, for a commission of unlivery of the cargo, but that application was opposed; and, on the 13th, bail was given by the owners of The Sussex and her cargo, and a decree of appraisement was granted. Under this decree the agent of the salvors was landing the cargo; and the present motion was for an order to suspend the execution of the decree of appraisement and the unlivery of the cargo, and to decree a *supersedeas* of the warrant against the ship and cargo, under the circumstances and upon the terms set forth in the affidavit of Mr. Barry, of Mincing Lane, who had been intrusted by the consignees to arrange for her removal, in tow of a steamer, to London. The affidavit stated, that on going on board The Sussex on the morning of the 27th, and requesting that the unloading might be stopped, the salvors' agent showed him the decree of appraise-

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<sup>1</sup> The 3 and 4 Vict. c. 65, s. 6, (printed in the Appendix,) enacts, "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damages received by, any ship or sea-going vessel," &c.

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The Gladiator. 3 Hagg.

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ment; but deponent having told him, that did not extend to landing the cargo, said he would consent to any \* amount [ \* 340 ] of value, and that if the ship was lost in going to London, such amount should be her value, and that in the usual course the true account of sales should be exhibited. That the agent replied, "that he would not recognize deponent unless he was the bearer of an admiralty document, and that he should recommence unloading." The affidavit further stated, "that the expenses incurred by the unloading had been unnecessary, and that if completed, the cargo could not be reladen."

The court said, it was ready to decree a monition to stop the unlivery; but on the salvors' proctor engaging that it should not be proceeded with, a monition was not decreed.<sup>1</sup>

At the final hearing, the court, having animadverted upon the salvors' misconduct after the ship had been brought to an anchor, decreed 2,100*l.* for salvage, besides costs and damage.

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### GLADIATOR, Britten.

June 15, 1836.

Collision by a foreign vessel that had a licensed pilot on board. Appearance under protest overruled, with costs.

THIS was a cause of damage by collision, brought by the owners of the ship Agnes and her cargo, and by the master, officers, and crew for their private effects, against The Gladiator, an American vessel. On the 11th of March, The Gladiator took on board a licensed pilot off Cowes, and on the same day, while in his charge, the collision took place, between the Mother Bank and St. Helen's.

The owners of The Gladiator appeared under \* protest, [ \* 341 ] setting forth 2, 58, and 55 ss. of the Pilot Act, 6 Geo. IV. c. 125; and alleging that the collision was owing to other persons on board and not the pilot, and that upon such allegation and proof tendered on behalf of The Agnes, the appearance under protest would be withdrawn.

The Agnes denied they were entitled so to appear.

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<sup>1</sup> See Order in Council, Appendix B.



*Addams* and *Haggard* for the protest. A pilot being in charge is *prima facie* responsible for the damage. But as the statute has received different interpretations,<sup>1</sup> the object of this protest is to submit the question, purely as a question of law, without being incumbered with matters of fact, to a higher tribunal. The right to appear under protest is denied, on the ground that "the collision happening on the high seas, the jurisdiction of the Admiralty Court, as well in this cause as in all others of a similar nature, cannot and ought not to be denied, and that many of the matters in the protest are questions of fact, which can only properly be inquired into and adjudicated upon when the whole merits are before the court; and that the other matters are questions of law which are dependent upon and may not ultimately be raised by the facts." Such are the reasons given by the answer to the protest; but the whole seems a mere question of words, for it signifies little whether the form of proceeding is called an act on petition, or a protest; it is called a protest because it is confined to a question of law; and it is consistent with the practice of the ecclesiastical courts, in appearing to a decree, to bring in an inventory and account, or to bring in a probate, or in ap-  
[ \* 342 ] pearing to an inhibition. So also in the \* Admiralty Court.

The *William*, 4 Rob. 214; *Rebecca*, 5 Rob. 102. The *Frederick*, 1 Dod. 266. The *St. Johan*, 1 Hagg. Adm. R. 334, and various others. The *Duke of Portland v. Bingham*; and *Maidman v. Malpas*, 1 Consistory Reports, pp. 157, 205, were cited.

*Nicholl*, against the protest. Of the two cases cited from the Consistory Reports, the one denied the jurisdiction of the court in the form that was there adopted; and the other denied that it could entertain a second suit against the same party for the same offence; they both involved a question of jurisdiction. But I much doubt whether a protest to an inventory and account, from there being a suit in chancery involving the same point, is a right form of proceeding; or, again, in the case of a probate, of long standing, being called in. The proceeding should be in those cases by act on petition. A case of collision has occurred; it is for the party charged to set up a good ground of defence. We may proceed by plea and proof; and thus have the opportunity of cross-examining the witnesses, who will have to prove that a duly licensed pilot was on board and acting in charge. In *The Christiana*, 2 Hagg. Adm. R. 183, both the learned judge and the counsel thought that the fact of a licensed pilot on board was not a ground of protest.

<sup>1</sup> See *The Girolamo*, *supra*, 169.

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The Gladiator. 3 Hagg.

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SIR J. NICHOLL, (after stating the nature of the suit, and the 2d and 55th sections of the Pilot Act, 6 Geo. IV. c. 125,) thus proceeded :

It is alleged, for the owners of The Gladiator, that, before they are bound to give an absolute appearance, the plaintiffs should allege that the \* damage was done through the misconduct of [ \* 343 ] some other person on board, and not of the licensed pilot.

But the answer is, that the protest is not a protest objecting to the jurisdiction, or to the mode in which the proceedings have been commenced, and that what is alleged in it is matter of defence when the facts are detailed.

The court is under the necessity of guarding its practice against innovations ; the jurisdiction is summary and *de plano*, and proceeds at once to the whole facts of a case ; those must be stated in the first instance by the complainant ; and, in collision suits, the most regular course of proceeding is by plea and proof, which enables the defendant to cross-examine the witnesses. If such proceedings be stopped by a preliminary objection and by splitting the defence, the foreign vessel may quit the country, and there may be a loss of witnesses. The case may lead to a question of law about which there has been some difference of opinion ; but when the facts are ascertained, the question of law may not arise, or only in part ; as suppose, for instance, the damage should turn out to have been done partly through the misconduct of the pilot,<sup>1</sup> and partly by the obstinacy of the master \* and crew of the vessel. However, it [ \* 344 ] would be dangerous to allow two matters, quite distinct, as what is matter of protest against the jurisdiction, and what is matter of defence, to be confounded. The court overrules this protest, with costs.

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<sup>1</sup> May 10, 1837.

A foreign vessel, (in charge of a pilot,) on the starboard tack, having run down a barge on the larboard tack, (being hailed to "keep her luff,") condemned in the damage and costs.

THE Carolus, Rotgers, an Hanoverian vessel of sixty-seven tons, while in charge of a pilot, ran down the barge Susan, laden with chalk. Both vessels were beating up Long Reach — The Carolus on the starboard, the barge on the larboard tack ; but in the affidavits on the part of The Carolus it was stated that The Susan was hailed to "keep her luff," and it thus became the duty of The Carolus to avoid her. The Trinity Masters, Captain Welbank and Captain Stanley Clarke, were of opinion that the fault lay with the pilot of The Carolus ; and the court, remarking that it had no power to condemn the pilot in the amount of his bond, pronounced for the damage and costs.

Phillimore, for The Carolus. Burnaby, *contra*.

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The Giacomo. 3 Hagg.

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GIACOMO, Tarabochia.

December 21, 1836.

*Quere?* Salvage remuneration for approaching a ship in impending danger. Claim against a foreign ship, upon facts showing a false case by the claimants, dismissed, with costs.

THIS was a claim on behalf of two smacks, for salvage. The Giacomo was a Venetian vessel of 200 tons and nine men, bound to Hull with a cargo of bones; and on the 1st of August, about 11 A. M., was alleged to have been running down an unfrequented and prohibited channel (between the Newcomb and Baconridge Sands) off Lowestoff, and that the smacks having approached her, at great hazard, Fletcher, the master of The Providence, jumped on board, found the vessel in only four fathoms water, put her helm up, and got the brig's head to the eastward. The value of the ship, cargo, and freight was 2,000*l*.

*King's Advocate* and *Robinson*, for the smacks.

*Phillimore* and *Haggard*, *contrà*.

SIR J. NICHOLL. Is there any case of salvage remuneration for having only approached a ship in impending danger; and where the danger, if any, had been removed before the asserted salvors boarded? In this case, that the ship was in a state of apprehended danger is only proved by the asserted salvors themselves. The ship had not shown any symptom of danger; there was no signal; no [ \* 345 ] injury \* sustained; no pumps were going; and the master had charts for his own guidance. In opposition to these facts, and the affidavits in support of them, it would be a dangerous precedent to award salvage; it must be a case made out beyond doubt, that the danger was impending, and that, if not warned, the vessel would have incurred it, to establish such a claim.<sup>1</sup> Here, if

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<sup>1</sup> The Henrietta, Dormansky, was a suit brought by the master, owners, and crew of the lugger Nancy, for salvage to this foreign vessel, in a state of proximate danger in Happsburg Gat, on the coast of Norfolk. On the other hand, the assistance was sworn to be unnecessary, and to have been refused.

*Haggard*, for the Nancy. *Queen's Advocate*, *contrà*.

SIR J. NICHOLL, adverting to the great danger of allowing such a claim for salvage,

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The *Meg Merrilies*. 3 Hagg.

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any danger existed, it ceased the moment that Fletcher put up the helm. Where, then, the necessity for the two smacks? This union of claim strengthens my impression that it is not a true case, and it bears strong marks of an improper attempt to get something out of this foreign vessel. The court is bound to protect all interests. The state of the wind and sea, as alleged by the smacks' men, is disproved by the affidavit of Lieutenant Matthews. I reject the petition, with costs.<sup>1</sup>

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\* MEG MERRILIES.

[ \* 346 ]

January 21, 1837.

Upon a claim for salvage, the ship being on her voyage, a monition decreed against the owner.

*THE King's Advocate*, on behalf of the master, owners, and crew of the steam-vessel *St. Patrick*, (286 tons and 160 horse power,) and upon an affidavit of the master and two others, moved for a monition against the owner of *The Meg Merrilies*, and the cargo now or lately on board, to show cause why salvage should not be pronounced due to *The St. Patrick*. The brig was on her voyage.<sup>2</sup> Monition decreed.<sup>3</sup>

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remarked, that if he did not give the petitioners credit for an honest belief that the brig was in danger, he should condemn them in costs; but he rejected the petition, and condemned the petitioners in 5*l. nom. exp.*

<sup>1</sup> In *The Susannah Brown*, (a schooner of Colchester, of forty-six tons,) a suit for salvage (in 250*l.* on a value of 500*l.*) by the smacks *Liberty* and *Eagle*, of Colchester, was held, after hearing the *Queen's Advocate* for the smacks, and *Nicholl* for the schooner, to be a fraudulent case, and was dismissed, with costs.

<sup>2</sup> The brig was 230 tons; and, in a dismasted state off the Land's End, accepted the services of *The St. Patrick*, (on her voyage from Waterford to London, with a crew of twenty men,) and was towed by her (for nineteen hours and about 105 miles) into Plymouth. She was insured for 9,500*l.* The court awarded 750*l.* and costs. *King's Advocate* and *Nicholl*, for salvors; *Addams* and *Jenner*, *contra*.

<sup>3</sup> See *The Hope*, 3 Rob. 215.

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The Lima. 3 Hagg.

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LIMA, Fewson.

January 21, 1837.

Suit for wages by a chief mate, who, after having served in that capacity for six weeks while the ship was fitting out, and also between eight and nine months at sea, (being suspended, during that time, for a week, and reinstated,) was then finally disrated, dismissed; but there being some degree of passion and imprudence imputable to the master, who was sole owner, without costs.

Ill-usage is an undefined term, depending much upon the opinion of the person who uses it, and the provocation and relation of the parties.

Holding of fists, to strike a captain, is so near an act of mutiny that the master may quell it by striking the first blow.<sup>1</sup>

*Semble*, a chief mate, who, unknown to the master, signs, and is active in getting signed, a document tending to mutiny, incurs a forfeiture of wages.

THIS was a suit for a balance of wages, amounting to 69*l.* 8*s.* 7*d.*, brought by the late chief mate of the above ship, as earned in her service, from the 23d of October, 1834, to the 15th of June, 1836. The crew consisted, with the master and two apprentices, of twelve persons; and there was also a cabin passenger, Charles Bedford Young, as supercargo.

The summary petition pleaded, that "on the 23d of October, 1834, The Lima, being in the port of London, designed on a voyage to any port or ports in the western coast of Central America, and [ \* 347 ] \* from thence to any port of delivery in Great Britain, Thomas Fewson, the master and sole owner, shipped and hired Thomas Stephenson to serve as chief mate on board The Lima, during her then intended voyage, and agreed to pay him wages at the rate of 6*l.* per month, until he was victualled on board, and after that period, until the completion of the voyage, at the rate of 4*l.* 10*s.* per month; that Stephenson entered into the service of the ship accordingly, and immediately commenced fitting her out for sea, and victualled himself until the 30th of November, (from which time he was victualled on board,) and on the 10th of December signed the usual ship's articles, or mariner's contract, for the performance of the voyage; that, a general cargo having been taken on board, the ship, on the 21st of January, 1835, sailed for the port of Conchagua, in Central America, where she arrived in June, and there discharged part of her cargo, and thence proceeded to Istappa, in Guatemala, where she discharged further part of her cargo; that she then took on board a

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<sup>1</sup> [See *Fuller v. Colby*, 3 Wood. & Min. 1.]

The Lima. 3 Hagg.

few bales of goods, and reshipped part of her outward cargo which had been landed, and proceeded with the same for the port of Libertad, but which port the said ship passed on the 6th of September, the master not being aware that she had arrived off the port; that, on the 7th Stephenson was despatched by the master in the jolly-boat, with three of the crew, to find that port, and used every exertion so to do, at the risk of their lives, owing to the surf; that whilst employed in that service, and taking every precaution to keep off the land, the boat was struck by a heavy sea, whereby she was broken to pieces, two of the crew were drowned, and Ste- [\*348] phenson and the other seamen with difficulty saved their lives; that Stephenson having got ashore, and ascertained the direction of the port, made signals to the long-boat, which had been despatched after the jolly-boat, as to the direction of the port; and on the morning of the 8th the ship entered the port of Libertad, and the residue of the cargo was discharged; that the master had repeatedly struck and otherwise assaulted and ill-treated Stephenson during the voyage, and that, upon his rejoining the ship at Libertad, after the accident in the jolly-boat, he refused to permit him to act any longer as mate, or to do any more duty on board, whereupon Stephenson applied to the British consul at Guatemala for advice, who instructed him to remain by the ship, and in compliance with that advice he continued on board during the residue of the voyage; that the ship afterwards proceeded to Rio Legio, where she arrived in October, and there took on board logwood and indigo, with which she arrived at the port of Conchagua in November, and there completed her cargo of indigo, and arrived in the port of London on the 15th of June, 1836, having earned very considerable freight; that Stephenson, when permitted, well and truly performed his duty as chief mate," &c.

This claim was resisted, in a defensive allegation, by the master and sole owner, on the grounds of disobedience of orders, breaches of discipline, and conduct calculated to excite mutiny. The question was argued as one of wages or no wages.

*Addams and Haggard*, for the mate.

*Burnaby and Nicholl*, *contra*.

\* **SIR J. NICHOLL.** This is a suit for wages by Thomas [\*349] Stephenson, as chief mate of the ship *Lima*, against the master and sole owner, during a voyage from London to the western side of Central America and back. The service for which wages are demanded, was from October, 1834, to the return of the vessel to Lon-

don in June, 1836.- The summary petition sets forth that the mate faithfully and diligently performed his duty. The defensive allegation imputes misconduct, disobedience of orders, and a forfeiture of all wages; a responsive allegation contradicts the charges of misconduct, and justifies the non-performance of duty. On these pleas six witnesses have been examined by the mate, and only one by the master: but numerous interrogatories have been administered on the one side, as well as on the other; and the case involves many questions of importance.

The maritime law and the legislature have always considered this valuable class of persons, the British mariners, as highly claiming encouragement and protection; but, on the other hand, the maintenance of order, discipline, and the authority of the commanding officer on board, are essential to the safety of navigation, and the great commercial interests of the country. These general principles are distinctly laid down in many authorities; and the arguments on either side were elaborate in support of them; and it is between these principles that the court has to decide the present case.

[After stating the outline of the voyage and the dates [ \* 350 ] principally taken from the log,<sup>1</sup> and \* coinciding with the summary petition, the court proceeded.] The correctness of the log in these respects there seems no reason to doubt; and it may now be proper, before I enter upon the particular evidence, to inquire who the witnesses are, what may be their prejudices, and how far they are to be relied upon.

The first witness on the summary petition is Prior, a seaman. This witness says, "I never gave the master an angry word;" but he was in the jolly-boat when he urged Chester, the senior apprentice, to land, contrary to the master's orders; and again, he was with Stephenson in the jolly-boat when she was lost, though he admits the master's order in that instance also was not to attempt landing: he also staid two days on shore though he had leave only for one; and at Rio Janeiro he reproached Lamb for acting as chief mate, under the master's orders. Wilson was the second mate; his wages were 3*l.* only per month, not much exceeding those of an ordinary seaman; and he was not appointed chief mate, when Stephenson was superseded: he also was on shore a day more than his leave; and returned in liquor. The prepossessions of this witness are clearly on the side of Stephenson. Waugh, the cook, though he had had a

<sup>1</sup> The log had been brought in on the part of the mate: the entries respecting the inquiry in this case, were made by the master, or from his dictation, and were not pleaded; but witnesses spoke to their correctness, and they were read. See 5 & 6 W. IV. c. 19, s. 7, as to entries in the log connected with forfeitures for temporary absence from duty.

quarrel with the master, and was struck by him, yet has been paid his wages, as also Cox, and both signed the usual declaration, that they had no further \*claims "against the master, [ \*351 ] the owner, or the ship." The fourth witness is Cox, an apprentice of the age of 15. The fifth, (for Chester is only examined on the responsive plea,) is Young, the supercargo; he has been twice examined, and *prima facie*, would be the witness most entitled to credit; but it appears that he had most violent quarrels with the master on all the outward voyage; that as early as May, 1835, he got, without the master's knowledge, a paper signed by the crew, and to which I shall more particularly refer: that he imputed the loss of the jolly-boat and of two of the seamen to the "lubberly navigation of the master," (though he did every thing to guard against such a disaster,) and he has now two actions pending against him—one for a libel, and the other for a breach of contract respecting supplies for the voyage; that at the police office he spoke of the master as "the greatest monster living," and used such language against him, that by the magistrate's direction, he qualified it. In his examination in this cause, he also uses most approbrious expressions (and without any thing in the interrogatories to call for them) against the master, as "that he was too great a coward" to fight him—an assertion which the master has had no opportunity of explaining.

A person, then, so vindictive as the witness, Young, and uncontrollable in temper, that he cannot restrain himself even when giving evidence, is not entitled to full credit, more especially upon matters of opinion; and still less if positively contradicted as to facts within his own knowledge. Now, he swears, that he did not try to make up a pitched battle between Cox and \*Chester,—yet [ \*352 ] they swear that he did; and that Young quarrelled with the master because he would not allow it, and said, that the master was "too damned fastidious." What language or conduct can be more subversive of discipline and order in a ship?—and yet he thus speaks of himself:—"from the numerous voyages I have been, I consider myself a competent judge on such a point; and I depose, that Stephenson did well and truly perform his duty as mate, and was obedient to all the lawful commands of the master, and well deserved his wages as mate." He further says, "that the master had treated Stephenson with great brutality, had turned him out of the cabin, and sent him forward:" and on the 5th interrogatory, "I never heard Stephenson use abusive language to the master, except when struck, or pushed, or otherwise brutally treated:" and on the 6th, in regard to himself, "I never, unprovoked, used abusive language to or of Fewson." Thus he qualifies his own language and that of Stephenson; but the witness leaves unexplained what he would consi-



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The Lima. 3 Hagg.

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der to be a provocation. I must, then, lay the evidence of this witness, either as to opinion or as to facts, out of the case.

In regard to the other witnesses, Prior, Wilson, Waugh, and Cox, it appears that there was much intercourse between them and Stephenson and Young about the period of their examination in this cause. The court will, therefore, look to specific facts and dates, as to which they may possibly be contradicted, and not to opinion only. And upon the specific facts, I can hardly discover [ \*353 ] one on which the master could defend \*himself. As to "ill-usage," that is a very undefined term, depending much upon the opinion of the person who uses it, and taking its character out of the provocation given, and the relation in which the parties stand to each other. What in one instance may be the just exercise of authority, or may be moderate correction, or even justifiable defence, may, in another, be intemperate passion, or wanton cruelty. For example, in regard to Waugh, Lamb says, that the master admitted that he had struck Waugh; even that might be justifiable, though, certainly, very few circumstances can justify a master of a ship in personal violence; yet if, as the witness says, Waugh, in liquor, held up his fists to strike his captain, it is so near an act of mutiny, that it was justifiable at once to quell it by striking the first blow: and thus the matter ended; for there were no more quarrels between them, and Waugh has been paid his wages. This transaction may show, that the captain was a man of warm temper; but Lamb says, "he would put up with a good deal at times." Now, although it is necessary that the master should be supported in enforcing due subordination and discipline in his ship, yet the law will not countenance his giving way to intemperate passion; for that is not only unjustifiable, but certainly is not the most effectual mode of maintaining proper authority.

Upon one occasion it seems that the master seized Stephenson by the collar and tore his shirt; but what the particular cause of quarrel or the provocation was to that act, does not appear. Chester gives this account of it: Stephenson and the captain were quarrelling on deck; and \*while the captain held him by the collar, Stephenson said: "No one but a scoundrel and a blackguard would take me by the collar and use me in this way." Such language amounts to his calling the captain "a scoundrel and a blackguard;" and yet, according to Chester, the master did not give Stephenson any blow either before or after those gross terms.

It is not immaterial to bear in mind, that Stephenson was quite acquainted with the master's character: he had been brought up by him; he had sailed several voyages with him; he had, therefore, his own experience of the master's temper and character; and yet he

himself applied to be chief mate. At all events, he was under no obligation to take the berth. Is it, then, a true description of the master's temper and character that he was "the greatest brute living?" Stephenson's own evidence, by his own conduct, is the best criterion to resort to for an answer.

There are many things which might have concurred to have produced changes in both the master and Stephenson, and to lead them not to agree so well upon this voyage. Stephenson was now elevated into a higher situation; he was first mate; living in the cabin, and there associating with Young, who was constantly resisting the authority of the master, and in disputes with him. Thus encouraged, he would become less orderly than formerly; and yet, as chief mate, it was more incumbent on him, by his conduct and example, to support the authority of the commander and the discipline of the ship; he ought to have been the last person to show insubordination and disrespect towards one who filled a situation \* which he had often had to fill himself. On the other [ \* 355 ] hand, the master, from the age of Stephenson, and recollecting his old authority over him, might be too observant of any want of obedience or respect, and too prompt, perhaps, in resenting it.

In reference to the general conduct of Stephenson, I shall examine the facts; first, up to the time of his being finally disgraced as mate; and, secondly, to the end of the voyage. That Stephenson and Young drew together; and that Young and the master, very early on the outward voyage, had grievous quarrels, so that mutinous conduct was imputed, and an application to a king's ship threatened, are points clearly established. The document annexed to Young's evidence, and which was signed after liquor had been distributed by him in the fore-castle, proves them. It is headed — "To the crew of the brig Lima, Thomas Fewson, master, on her outward bound voyage from London to Guatemala, 1835, on board the brig Lima, 18th May, 1835," and the contents are important: "Whereas the said Thomas Fewson has threatened, if he met a man-of-war, to hoist his ensign upside down, and to accuse me of mutiny; and whereas he still threatens to wreak his vengeance on me for I know not what, I will thank you to answer the following questions:

"1st. Did you ever see me guilty of mutinous conduct, or any thing bordering on it?

"2d. Did you ever see me attempt to take the authority out of the said Thomas Fewson's hands, or interfere with him in any way in the business of the ship?

"3d. Did you ever see me conduct myself otherwise than [ \* 356 ]

as becoming a gentleman? I put these questions now, because as the said Thomas Fewson threatens to turn some of you out of the vessel, and others may leave, I might by delay be deprived your testimony. I am, your obedient servant, CHARLES B. YOUNG.

"Thos. Stephenson,	1st mate,	No.
Jas. Wilson,	2d mate,	No.
Wm. Lamb,	carpenter,	No.
Wm. Simpson,	cook,	No.
Jas. Waugh,	seaman,	No.
Jn. Prior,	do.	No.
Thos. Ford,	do.	No.
Thos. Cawer,	do.	No.
Henry Damerall,	do.	No.

"On leaving the vessel, I offered to return this paper, if any one regretted signing it, and they all offered their readiness to repeat their assertions again at that date."

Such is the paper which, unknown to the master, is signed by the chief mate. What can more tend to mutiny? He is the active agent to get it signed; and it is signed by all the crew but one of the cabin boys. Can such conduct be justified? Is it not alone sufficient to forfeit the wages of the mate? But there are other facts against him which came out upon the cross-examination of his own witnesses; they indeed prove every important circumstance; so that it is not necessary to resort to Lamb's evidence.

Now it is proved here, that Stephenson declared he would give the master "a wide berth," namely, that he would leave the ship; that he required repeated calling before he would turn out on his [ \* 357 ] \* watch; that he was negligent and inattentive while in command; and that he allowed the hawse to get seven turns. If, while the crew were engaged in stowing the cargo, the hawse had got one or two turns, that might have been passed over; but here it gets seven; and he also allowed the chronometer to run down: these are circumstances which all took place at Istappa. The first disrating had occurred about a week before the first arrival at Conchagua; and he was there not only reinstated, but is so entirely forgiven, that when he goes on shore at Istappa to fight a duel, he puts into Stephenson's care his papers and the charge of the vessel. Yet the master is said to be vindictive and unfeeling, savage and brutal. His conduct, at least as to that reinstatement, shows forbearance.

I now come to the final disrating; and I am to consider whether this was an act of justifiable and proper discipline or oppressive

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The Lima. 3 Hagg.

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authority. Bearing then in mind what had already occurred, I proceed to the loss of the jolly-boat, on the 8th of September, and the much more deplorable accident consequent upon it, namely, the loss of two lives. The ship was proceeding from Istappa to Libertad — a very small place, and they were unable to ascertain its position. In the morning, the jolly-boat with Chester, Prior, and two others was sent towards the shore to inquire respecting its situation, but with positive orders not to attempt landing, which orders Chester punctually obeyed; the boat returned with some information, and about three o'clock in the afternoon of the same day was sent away a second time with similar orders, and with still greater precautions; for a \*grapnel and lines were put into the boat [\* 358] (as well as a speaking-trumpet) so as to enable her to approach the shore within the exact distance where it could be done with safety, and on this occasion the management of the boat was intrusted to the chief mate. According to Prior's account, and he, of course, would represent it most favorably, (though in some respects his account is hardly within the bounds of credibility;) they first dropped the grapnel at about sixty fathoms from the shore and eased the boat in with an eighteen fathom line, and were thus quite safe, but unable to make themselves heard by the people on shore; they then hauled back to the grapnel, took it up, and dropped it again, but nearer to the shore, and again eased the boat in, but so near on this occasion that she was struck by a surf and knocked to pieces — "twenty-five or thirty pieces," the witness says: Stephenson and he saved themselves by swimming on shore, but the other two men were unfortunately drowned. Stephenson being thus on board the boat, in full command of her, enjoined by the master not to incur any danger, and furnished with proper means to guard against accident, is he or is he not the person responsible for this melancholy disaster, the loss sustained on the occasion being the more calamitous in this remote part of the world?

What course then does the master pursue under the circumstances I have just stated? Is it that of passion and vindictiveness; or does he act with proper deliberation and caution, as making a necessary example in the regular discharge of his duty? On Stephenson returning on board he is reported ill but the master apprised him that he \*could no longer allow him "to act as mate," [\* 359] as appears from the evidence and from the entry in the log, "Mate off duty;" and from that day Lamb signed the log. Was the appointment of Lamb an improper one? He was the carpenter, a person next in trustworthiness to the chief mate in vessels of this description; he seems to have been a man of considerable nautical experience; forty years of age; and his wages were nearly the same

as Stephenson's. It seems to me to have been a proper selection. In about a week Stephenson is reported able to do duty ; but sufficient time having elapsed to allow the master fully to consider the case, he, on the 16th of September, gives him a notice in writing disrating him, desiring him to go before the mast, and to remove out of the cabin.

Here, then, we find that the master did not act hastily, nor in a passion, but after a week's consideration, and by notice in writing he disrated Stephenson ; and the court must therefore decide whether his so doing was justifiable or unjustifiable ; whether Stephenson really continued to be mate, and is entitled to full pay as such, or whether he is entitled to pay as a seaman ; whether he is entitled to pay as a seaman only from the time he acted as such ; or lastly, whether he has forfeited his whole wages, and is consequently not entitled to recover any compensation for any part of the voyage. The rules and principles of law applicable to such questions are well settled, and may be clearly deduced from the mariner's contract, the very object of which is to fix the duties between the parties. It is the charter

agreed upon on both sides ; it is strictly enjoined by statute ; [ \* 360 ] and although the powers with which the master is \*invested are large, yet they are the usual powers, and are found by experience to be essentially necessary to support the order and discipline of navigation ; and moreover they are confirmed and even strengthened by the last act of the legislature on the subject, the 5 and 6 W. IV. c. 19. After Stephenson's neglectful conduct ; his disrespectful language ; above all, after the loss of the boat and the lives of the two seamen, it seems hardly possible to doubt that the master was justified in disrating him and in sending him before the mast.

The next question is, whether the master might afterwards have been justified in forgiving Stephenson, in restoring him to his rank, and again intrusting him with the discharge of the duty of chief mate ; and that must depend in some degree upon the sequel of Stephenson's conduct. But does that conduct furnish any proof of his repentance ? Just the reverse ; for instead of submitting to this act of discipline and duty on the part of the master—an example necessary for the government of the ship ; he uses all the means in his power to disobey and resist authority, and to induce others to do so. Four days after his disrating, he, in connection with the second mate, and with a reference to Young, who was on shore, applies to the British consul at Guatemala ; and the consul very properly advises them to do their duty, and to wait for redress until their return to England ; or if they cannot wait, to address themselves to the first king's ship they may fall in with. Soon after this communication from the consul, Stephenson and some others have leave to go on shore, and

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The Lima. 3 Hagg.

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instead of returning on the same day, or within twenty-four hours, (for which period only \* leave is invariably given in [ \* 361 ] these cases, as appears from Prior's evidence,) he and Wilson stay from Sunday until Tuesday, when Wilson returns on board in liquor, the canoe bringing them is upset, and they refuse to pay for it. Another step Stephenson takes is to associate with the mate of *The Cecilia*; and suffers him in his presence to find fault with Lamb as "a shabby fellow," for undertaking the duty of chief mate; and he endeavors to dissuade him from discharging that duty. He also gets Young to lay a complaint against the master before the port captain, and the master and the chief mate are accordingly summoned. Young attends the proceedings as the agent and advocate of Stephenson; interpreters are called in on both sides; and the port captain declines to interfere; nor was this surprising if any credence is to be given to a certificate annexed to the defensive allegation. What may have been the effect of Young's violent conduct and groundless calumnies against the master when before the port captain, it is not very material to consider, for it is clear that Stephenson, from the 2d of November, from which time he refused to do any work as a seaman, did every thing in his power to excite dissatisfaction and disobedience amongst the crew, and to induce them to misconduct themselves. He was in the habit of talking of the master's proceedings as "rascalities." At Rio Janeiro the same sort of language, having a tendency to create dissatisfaction, if not mutiny, is repeated, and the master is called a "scoundrel" and a "blackguard." The effect of this language upon Prior is clear; for he admits he told Lamb "that he ought to be ashamed of himself for taking the \* berth of another man, and he on board the ship; and [ \* 362 ] Lamb himself candidly states the effect it produced on him, namely, "that between the crew, the master, and Stephenson, he was so uncomfortable as chief mate that he would have preferred being before the mast."

What might have been the consequence if Stephenson had pursued a different line of conduct, if he had shown some contrition for what had taken place, if what had occurred had rendered him more attentive to the careful performance of his duties as a mariner, it is impossible to say. It is not by any means certain that the master might not have forgiven, and even restored him to his rank, as soon as he had found from his continual good conduct that he had become trustworthy; at all events, the court is uniformly disposed to go as far as the law will allow in administering justice with forbearance towards the mariner;<sup>1</sup> but here Stephenson's conduct tended to the

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<sup>1</sup> "It is not a single neglect of duty, or a single act of disobedience, which ordinarily

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The Earl Grey. 3 Hagg.

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creation of mutinous misconduct throughout the return voyage. Upon the whole, then, the duty of the court appears obvious, if a right view has been taken of the evidence and the material parts of the whole transaction. It may indeed be a hard case on this young man, and probably has arisen from its having been his misfortune to have been associated with Young, and from his having suffered himself to be misled by him; but the court must not suffer itself [ \* 363 ] to be led away by the \*hardship of the case upon the party suing. If the chief mate of a vessel can be allowed to pursue such a course of conduct, totally subversive of the discipline and authority necessary to be maintained at sea, and tending to destroy all subordination, the interests of the merchants and ship-owners of the country will be greatly endangered. I am therefore of opinion that Stephenson has failed to show that he diligently and faithfully performed his duty, and that the master is entitled to be dismissed, but without costs; as there appear to have been fair grounds for bringing the case before the court.

This sentence was appealed from by Stephenson, and, after, hearing, in part, *Addams*, for the appellant, was affirmed.

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EARL GREY, Topham.

January 30, 1837.

Towing by steamer. Apportionment of salvage.

THIS vessel, of 470 tons, on a voyage from Liverpool to Africa, having been run foul of in St. George's Channel, and her bowsprit and foremast carried away, was met with in this disabled state with a signal of distress flying on the 19th of August, by the Solway steamer, (two engines, each of forty-five horse power,) bound to Liverpool, and by her towed into that port. \* The towing occupied twenty-nine hours; and the value of the steamer was about 12,000*l.*, and that of The Earl Grey and her cargo about 4,000*l.* The facts were agreed upon. *King's Advocate* and *Nicholl*, for the salvors. *Jenner*, for The Earl Grey.

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carries with it the forfeiture of wages." The *Mentor*, 4 Mason, (U. S.) 84, cited from Curtis' Admiralty Index, Boston, 1839. And see the *New Phoenix*, 1 Hagg. Ad. R. 198; The *Lady Campbell*, 2 Id. 14; The *Vibilia*, 2 Id. 420; The *Gondolier*, *supra*, 91.

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The Edwin. 3 Hagg.

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\* SIR J. NICHOLL — Observing upon the hopeless state of [ \* 364 ] the vessel when the steamer came to her assistance, and the necessity of giving an ample reward to large steamers, — decreed 900*l.*; and on a subsequent day, upon the application of the owners and mariners of the steamer, the learned judge apportioned that sum, giving 450*l.* to the owners — being half of the whole — on account of the value of their property that had been put in some risk; 50*l.* to the master, on account of his responsibility in undertaking the salvage; and directed the remaining 400*l.* to be distributed among the officers and crew in proportion to their respective weekly wages, the master sharing *pro rata*, exclusively of the 50*l.* specially allotted to him.<sup>1</sup>

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EDWIN, Robertson.

February 6, 1837.

In a suit for wages, a protest, by the master, alleging that, under the 5 and 6 W. IV. c. 19, s. 15, the seaman had elected the jurisdiction of a magistrate, who had dismissed the claim on the ground of forfeiture by desertion, overruled; the object of the statute being to give such summary jurisdiction only in cases of mere *quantum*, involving no legal question.

This was a suit for wages, by David Keef, late a seaman on board The Edwin, against the master. The master, under protest, alleged, in substance, “that Keef was hired and shipped at Newcastle on the 17th October, 1835, and quitted and ceased to be employed on board on the 8th of June, 1836, and that on the 22d of December, he summoned, under 5 and 6 Will. IV. c. 19, s. 15, the master to answer, at the Thames police office, his demand for 17*l.* 11*s.*, the balance of his wages; \* that the master attended, and on the [ \* 365 ] 26th, the magistrate pronounced the balance to have been forfeited, and dismissed the master; that though such award was final, Keef, on the 30th, entered this action, claiming now a balance only of 11*l.* 15*s.*”

For the mariner it was alleged: “that the articles described the voyage as from Newcastle to Rio Janeiro, or port or ports of Brazil, and where the brig might trade until her return to a port of discharge in England; that she arrived at Cowes with a return cargo from Rio, on the 7th June, and was there ordered to proceed to Trieste as her

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<sup>1</sup> See The Albion, *supra*, 254.



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The Edwin. 3 Hagg.

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post of discharge; that Keef, as most of the other men, claimed a discharge with a certificate under 5 & 6 Will. IV. c. 19, s. 13; that the master refused, or to produce the articles; that the master was summoned and did not attend; that the penalty of 5*l.* was pronounced for; but not levied as the ship had sailed, having on board Keef's clothes and chest; that the claim of 17*l.* 11*s.* was for full wages, leaving the master to make his set off,<sup>1</sup> but that instead of entering into such account, the master asserted a forfeiture by desertion; that the magistrate had not authority to, and did not, in fact, decide the question; that he made no order, and expressly stated that Keef must apply to a higher court, under sec. 16."

A rejoinder, denying that at Cowes the articles were demanded, admitted the service of the summons, but alleged, that the ship had then a pilot on board, and sailed before the time for attending the magistrate; it also denied, that the magistrate at the Thames police said that Keef must apply to a higher court.

These statements were respectively supported by an affidavit of the master and of the mariner, and their legal advisers at the police office.

*Addams*, for the protest.

*King's Advocate*, *contra*.

SIR J. NICHOLL. It was the object of this legislature, in passing 5 & 6 Will. IV. c. 19, to assist mariners in a speedy recovery of their wages, and for that purpose, to give to magistrates a summary jurisdiction where the *quantum* of wages was merely in dispute; but it was not, I apprehend, intended to enable them to decide upon intricate questions of forfeiture, whether arising from imputed desertion, disobedience of orders, or from any other cause.<sup>2</sup> How far, in this case, a forfeiture may have been incurred, may depend upon what took place at Cowes; and the affidavits are contradictory as to the grounds upon which the demand before the magistrate at the Thames police office was disposed of; his award is alleged to be final; yet there is no decree, no record in writing of his decision before me; I must overrule the protest; but the sum in dispute is so small, that it is very desirable it should be settled out of court by the counsel on

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<sup>1</sup> See *The Lady Campbell*, 2 Hagg. Adm. R. p. 14.

<sup>2</sup> See *Test*, *supra*, 805.

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The *Eolides*. 3 Hagg.

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either side. If the case should proceed, I direct that the seaman should give — not merely his juratory caution — but bail to answer costs.

Protest overruled.

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\* *EOLIDES*, Malngam.

[ \* 367 ]

February 6, 1837.

Protest, in a suit for damage to a vessel at anchor, by a foreign ship in charge of a pilot between Woolwich and Blackwall, waived; and, upon the facts, payment of the amount of damage to the vessel decreed; but a claim for consequential damage to the cargo, after the vessel had been run ashore, rejected.

THIS was a suit for damage done by a Swedish ship, in having, at 2 P. M. of the 13th of September, run foul of *The Royal Oak*, while at anchor between Woolwich and Blackwall.<sup>1</sup> A piece was knocked out of the side of *The Royal Oak* by the anchor of *The Eolides*, which was a “cock-bill;” *The Royal Oak* was run ashore, and the water there flowing into her and gaining upon the pumps, damaged her cargo of corn and malt. The action was entered in 1,000*l.* against the ship and freight. Bail was given in 400*l.* for the owners of that part of the cargo which remained on board *The Eolides*, so far as regards the freight, but under protest. That protest was afterwards waived,<sup>2</sup> and an appearance was also given for the owners of the ship; and the cause was heard on act on petition and affidavits. The injury to the ship, and the “consequential damage” to the cargo, were laid at 500*l.*

*King's Advocate* and *Haggard*, for *The Oak*.

*Addams*, for *The Eolides*.

SIR J. NICHOLL. There is no question, that of two vessels, one under sail and the other at anchor, it is the duty of the former to

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<sup>1</sup> See 1 & 2 Geo. IV. c. 75, s. 32, and *The Christina, Larsen*, 1 Hagg. Adm. R. p. 184; also, *The Baron Holberg*, *supra*, p. 244; and 3 & 4 Vict. c. 65, s. 6, which is printed in the Appendix. [*The Girolamo*, 3 Hagg. Ad. R. 169.]

<sup>2</sup> See *The Gladiator*, *supra*, 340.

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The Nicholaas Witzzen. 3 Hagg.

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avoid the latter; here, the captain was not to blame, be-  
 [\* 368] cause his ship was in \* charge of a pilot; nor was the injury  
 here the fault of the pilot, but of the crew, in not keeping a  
 good look-out and apprising the pilot. It is true the anchor was a "cock-  
 bill" by the pilot's order, but that was necessarily so, to be prepared  
 for sudden anchorage; however, the owners of the ship must make  
 good that damage; but as respects the damage done to the cargo on  
 board, and stated to have been in consequence of the collision, that  
 damage occurred on the land; and it is very extraordinary that those  
 on board The Oak should have waited two tides, without appearing  
 to have done any thing during that period, to stop the leak; surely  
 there would have been no difficulty in stopping it by tarpaulins or  
 sails. The "consequential damage," then, independent of the place  
 where the damage occurred, is not, in my judgment, established as  
 part of the collision; and the owners of the cargo, therefore, must  
 seek their remedy elsewhere. This court cannot assist them.<sup>1</sup>

The following decree was entered:—

The court pronounced 40*l.*, expended for repairs done to The Royal  
 Oak to be due for damage; but rejected the prayer of the owner of  
 the cargo lately on board that vessel, and dismissed the bail, given on  
 behalf of a portion of the cargo on board The Eolides, to answer  
 freight; and decreed the ship to be released on payment of the 40*l.*

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[\* 369]

\* NICOLAAS WITZEN, Lange.

February 13, 1837.

Salvage. Out of a value of 3,000*l.*, 20 guineas is not a just reward to a pilot and six men,  
 who, having gone out of Portsmouth harbor to a vessel dismasted, without anchors, and  
 bumping near to Haslar Hospital, piloted her into Portsmouth harbor, and placed her in  
 safety. The service occupying several hours; 80 guineas awarded and apportioned.

This Dutch ship, with a Dover pilot, was, on the morning of the  
 29th of November, driven from her anchorage at the Mother Bank, and  
 in a dismasted state, with all her anchors gone, and with her windlass  
 broken, the wind being at S. W., was driven on shore at 10 A. M.,  
 near to Gillkicker Point, about a mile and a half from the entrance  
 into Portsmouth harbor; she then bumped along the gravel towards

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<sup>1</sup> See The Betsey Caines, and note, 2 Hagg. Adm. R. 30.

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The Traveller. 3 Hagg.

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Haslar Hospital, and her false keel was beaten off; her pumps were kept going; and having made a signal for assistance, Hayes, a Portsmouth pilot, and six men, went out of the harbor to render it.

*King's Advocate* and *Jenner*, for the salvors.

*Phillimore, contra.*

SIR J. NICHOLL. [After stating the above facts.] What, then, is the merit of the salvors? The principle feature is, that these men, a pilot and six comrades, at the risk and peril of their own lives — before the shift of wind to the N. W. — before the storm had much abated, or the sea became less agitated, go out in a wherry and make for this distressed vessel. At that time, the flag at Portsmouth was flying, which prohibits all government vessels from attempting to go out of or come into the harbor; this fact confirms the affidavits of a number of disinterested persons, who from the shore witnessed the peril of these men; and the counter \* affidavits [ \* 370 ] are evidently as to a later period. After the pilot and his crew had got on board the vessel, the services were not of great difficulty, nor of long duration; but the vessel was given up to the management of the pilot, and under his charge, and through his knowledge, was carried into the harbor in the course of that tide, and placed in safety; the whole is completed by seven or eight in the evening. For this service, there is a tender of 20 guineas, the property being 3,000*l.*; I cannot consider this as a liberal and just remuneration, I decree 80 guineas and costs; giving out of this sum 20 guineas to the pilot, and 10 guineas to each of the boatmen.

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TRAVELLER, M<sup>c</sup>Clear.

April 26, 1837.

Upon a value of 12,246*l.*, the sum of 1,000*l.* awarded for the salvage to a steamer, for towing a vessel in a most helpless state and in imminent danger to a place of comparative safety; the stipulated payment to a steamer hired to bring her into port, not being the criterion for a salvage remuneration.

THIS was a case of salvage rendered by The Sir John Moore — a steam-vessel of fifty horse power, belonging to Mr. Atherton, agent for Lloyd's at Liverpool, and principally employed in carrying out anchors — to The Traveller. The Traveller, on the 25th of Decem-

ber, was in a most destitute state on East Hoyle Bank, at the mouth of the Mersey, and the steamer towed her to Hoylake, (each distant from Liverpool about ten miles,) where she was placed on the beach for temporary repairs. The steamer, by the violence of the weather, could not for some time get to The Traveller. The actual towing occupied about three hours. From Hoylake she was taken [ \* 371 ] \* to Liverpool by a steamer of 100 horse power, at the agreed sum of 30*l*.

The action for The Sir John Moore was entered in 1,500*l*.

*King's Advocate* and *Nicholl*, for the salvors.

*Burnaby* and *Haggard*, *contra*.

SIR J. NICHOLL. The primary object is the danger of the property saved, and its value, and the assistance actually received ; the secondary, the risk to the salvors and their property ; the skill, the time employed, and other collateral circumstances. The affidavits on both sides, in these cases, are apt not to be very correct ; but the master's protest here details fully the state of the vessel at the time she was assisted. She sailed from Liverpool on the 23d of December, and on the 24th put back to refit, having lost some of her sails ; they took a pilot on board, came to an anchor too near the East Hoyle Bank, and there grounded on the 25th ; the wind increased, and she struck very heavy on the sand, and the tiller broke. A signal of distress was hoisted, the jolly-boat stove in, the windlass capsized, several stanchions were carried away, and towards midnight she began to make a great deal of water. Such was her helpless condition ; and it is hardly possible to describe a vessel in a more destitute and helpless state ; she could not raise her anchor ; and if she could, she had no sails to take her to Liverpool. While in her perilous situation, a steamer came to her assistance about 9 A. M. of the 25th, and the fact, mentioned by the steamer, that the charts, compass, [ \* 372 ] letter-bag, and clothes of the master and \* crew were at that time in the long-boat, is not contradicted ; this fact speaks strongly, and shows how void of expectation were those on board The Traveller of saving her, so far as depended upon themselves. Mr. Atherton went on board, and consulted with the master and pilot. Both chains were slipped, and the steamer took her in tow, and endeavored to make Liverpool ; but not being of sufficient power, in the then state of the weather and of the vessel, she, with the concurrence of the master, the pilot, and Mr. Atherton, took her to Hoylake, on the coast of Cheshire — the vessel having upwards of seven feet water

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The Branken Moor. 3 Hagg.

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in the hold—and there placed her on the beach in comparative safety. Here the salvage service ended. The vessel, however, made so much water, that not only nine men were hired to pump, but even holes were bored to let the water out. From Hoylake she was towed on the 27th to Liverpool, by The Hero; and what that steamer received was by contract, and has no bearing upon the case of salvage.

What, then, is a fit remuneration to the steamer? She did not go out on purpose; there was no extraordinary risk to the steamer or peril to the persons on board; the time employed was short, and near to port, and her value about 4,000*l.*; but her services, I must remember, effected a rescue from imminent peril of a property of upwards of 12,000*l.* That she was in the employment of Lloyd's agent, does not affect the claim. In The Howard, 2,000*l.* were, I think, awarded;<sup>1</sup> but that was a service rendered by a powerful steamer, commanded by a naval officer, and where the steamer almost \* carried the vessel that was in distress; it was a case under [ \* 373 ] different circumstances from the present. If, in this case, I award 1,000*l.*, which is not quite ten per cent., that will, in my judgment, be a proper remuneration, and I award that sum, with the expenses.

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THE BRANKEN MOOR, Richards.

May 2, 1837.

Salvage. Claim of a Deal boatman (intervening in a salvage cause) rejected; and, on appeal, affirmed. In a case involving great risk, and where the salvors were numerous, and the property of the value of 10,500*l.*, 2,000*l.* awarded.

THIS ship, of 300 tons, with a general cargo, bound to Rio Janeiro, while endeavoring to work into the Downs, was compelled to bring up abreast the Middle Brake buoy in the Gull-stream, when one Marsh, of Deal, came alongside, and being taken on board, worked the ship into the Downs; and on the following day, during a very heavy gale, and the weather so thick that Ramsgate Harbor Light could not be discerned, he run ashore on Sandwich Flats, an expedient, it was said, resorted to in cases of extreme danger. She was

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<sup>1</sup> For the apportionment in The Howard, *vide supra*, 256, note.

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The Branken Moor. 3 Hagg.

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ultimately assisted by several luggers, with very meritorious exertions and skill, and got into Ramsgate Harbor. Value, 10,500*l*.

*Phillimore* and *Haggard*, for the luggers.

*Addams*, for Marsh.

The *King's Advocate* and *Nicholl*, for the owners.

SIR J. NICHOLL. On the 12th of December, 1836, an action was entered against The Branken Moor, her cargo and freight, on behalf of salvors, in the amount of 3,000*l*, and on the 13th of [ \*374 ] February, a separate \* action in 200*l* for Joseph Marsh, a Deal man. The case itself contains all the ingredients that can found a claim to high remuneration; first, as regards the extreme state of danger in which the ship, cargo, and crew were placed; secondly, as to the great risk, peril, labor, skill and enterprise of the salvors, and also their great numbers. The facts are not controverted; and it is much to the credit of the owners or of the underwriters (if the former are insured) that they have not attempted to beat down fair claims: "they admit the main facts, though somewhat exaggerated." The violence of the hurricane, however, is hardly capable of exaggeration.

I will first dispose of Marsh's claim.

The vessel was at anchor on the 27th of November, in the Gull-stream, in no apparent risk, when a boat and four men put out, without signal, from Deal. Marsh was received on board; the other three men went back for provisions, but did not return. Marsh denies that he is a pilot; but he is so described on the other side. He undertook to conduct the ship into the Downs; and I apprehend that it is as a pilot that he had her given up to him. On the 28th, the ship having been brought up by her best bower anchor off Sandown Castle on the previous day, her second anchor was let go, and she thus rode till the morning of the 29th, when, under some apprehension of danger (though that is only stated in Marsh's own affidavit) from a brig drifting against her, he directed both chains to be slipped, and early in the morning of that day he run the ship on the Sandwich flats. The gale increased to a hurricane; lights [ \*375 ] were exhibited as signals of distress, \* and several luggers put out from Ramsgate, long before daylight, to her assistance.

It is unnecessary to detail the mode in which each lugger was employed for the relief of the ship. She is found on a lee-shore, with-

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The Prince George. 3 Hagg.

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out anchors, without a rudder, having more than four feet of water, and all hands working at the pumps. One of the luggers was despatched for an anchor and cable; and about noon, when the weather had moderated, a smaller lugger was hauled to the ship, and employed to carry the master, passengers, and the exhausted part of the crew, and some of the most valuable articles in the ship, to Ramsgate. This lugger was so loaded that she nearly sunk; yet Marsh put himself on board, and having thus left the ship, never again came near to her. He has, however, intervened in this suit, and arrested the ship for salvage. The owners deny that he did any salvage service; and the affidavits relied upon to give him the character of a salvor, only speak in vindication of the ship having been placed upon the sands. I may therefore dismiss this claim.<sup>1</sup>

To the crews of the luggers, observing that on the 29th of November, in the state the ship was in, the underwriters would not have underwritten her for fifty per cent., awarded 2,000*l.* and the expenses — one fifth.

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\* PRINCE GEORGE, Shaw.

[ \* 376 ]

May 2, 1837.

An agreement for wages, as purser, having been entered into by a master and sole owner, the purser, prior to the ship's sailing, signed the usual articles, but in which there was no rate of wages specified for him. After the completion of the outward voyage he ceased, by the master's orders, to do duty as purser, but was not regularly suspended, for neglect of duty; the wages pronounced for, and a mortgagee, who opposed them, condemned in costs.

*Quere*, whether, though the owner be bankrupt, and the ship has been sold, and the proceeds are insufficient to pay mortgagees, a principal mortgagee has sufficient interest to oppose a mariner's claim for wages?

*Semble*, a decree for wages, with costs, to a mariner, when deceased, may be renewed to his administrator.

THIS was a cause of subtraction of wages, brought by Thomas Vokes. The summary petition pleaded his hiring on 25th May, 1835, for a voyage from London to Madras and back, at the agreed sum of 200*l.*, and that he signed the articles; that the ship sailed, with a cargo and 250 troops, on 6th July, and returned on 22d May, 1836. The agreement was as follows: — "This is to certify that

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<sup>1</sup> Marsh appealed from the above sentence, and it was affirmed. The owners did not, in either court, ask costs against Marsh. *Lushington* and *Addams*, for the appellant. *Queen's Advocate* and *C. F. Wordsworth*, *contra*.



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The Prince George. 3 Hagg.

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Captain Francis Shaw, of The Prince George, bound to Madras, &c., has agreed this day with Thomas Vokes, that he shall sail with him as purser, and, in consideration of the same, agrees to pay the said T. Vokes or his executors, &c., the sum of 200*l.* sterling, together with his necessary expenses during the said voyage, one fourth to be paid previous to the ship going to Gravesend, the remainder at the expiration of the voyage. Francis Shaw. Witness, T. Francis, George Yard, London, May 25, 1835."

On the 14th of November, 1836, the summary petition, to which this agreement was annexed, was opposed on the part of Mr. John Campbell, a merchant, as the principal mortgagee of the ship. The owner was a bankrupt, and did not appear.

*King's Advocate*, for Mr. Campbell. "The mariner's contract is conclusive and binding to all parties," 2 Geo. II. c. 36, s. 2.<sup>1</sup> [ \* 377 ] This contract \* was signed by the purser, and there are no wages specified in it for him. *Isabella*, 2 Rob. 241; *Elsworth v. Woolmore*, 5 Esp. 84. If the agreement for 200*l.* is to stand as wages, it seems like a fraud on the mortgagee, for there would be a lien for that sum on the ship.

*Addams, contra*. The cases do not apply; in both there were stipulated wages. A purser of trust and integrity was necessary from the number of troops, and the agreement is signed by the master and sole owner; the voyage out was very protracted.

SIR J. NICHOLL. The party who opposes this claim is described as "principal mortgagee;" I doubt whether this describes such an interest as gives him a right to oppose it;<sup>2</sup> and in suits for wages the court is anxious that seamen should not be harrassed with litigation. As, however, Mr. Campbell has given bail, and thus made himself liable to the decree of the court, and it being very desirable that questions of wages should be speedily settled, I will give my opinion upon the petition. It is a claim made on behalf of the purser; he signed the ship's articles, but there are no wages annexed to his column, and I observe also that there are none to the surgeon's, yet both were essential persons in a ship carrying out 250 troops to India.

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<sup>1</sup> 5 & 6 Will. IV. c. 19, consolidates all the statutes relating to wages of merchant seamen; and as respects the contract, it omits the words "binding and conclusive."

<sup>2</sup> See (in Appendix) 3 and 4 Viet. c. 65, ss. 3, 4.

There is no objection to this claim as made by a purser;<sup>1</sup> but it is said that by 2 Geo. II. c. 36, s. 2, the articles are final; but the 8th section \* reserves the remedy against the ship, and [ \* 378 ] here no wages are specified in the articles, and therefore that act does not apply. An agreement for wages may be made by word of mouth or in writing: the mariner incurs no forfeiture or penalty by not signing articles, it is only the master who does so. There might be another question, whether the act of Geo. II. applied, for it was repealed a few days after the ship sailed, and the services were mostly performed (and there was no suggestion in the argument that they were not duly performed) after its repeal. The case of *The Isabella*<sup>2</sup> has been relied on; there, articles were signed, and a rate of wages was specified in the articles: the claim for the wages was admitted, but the court refused to admit a claim—in itself not very favorable—set up for the value of a slave under a custom of trade: that case cannot apply where the articles do not specify any wages; and where the only proof as to wages is from facts *dehors* the articles. There are cases in this court, and recent ones, in which it has been held that the articles, where there are no wages specified, are not conclusive. Such was the case of *The Porcupine*,<sup>3</sup> in which Lord Stowell sustained a *quantum meruit*; and can it be held in this case that the man is not to have any compensation? The law favors a mariner suing for wages. Lord Tenterden says, “every officer, except the master, may sue in the Court of Admiralty, and may by the process of that court arrest the ship as a security for their demand, or \* cite the master or owners personally”<sup>4</sup> and a [ \* 379 ] case in *Sayer’s Reports*<sup>5</sup> is there referred to; that was a suit in the admiralty by the surgeon of a ship for wages due upon a contract in writing entered into upon land: and Chief Justice Ryder said: “as the surgeon of a ship is under the command of the master, and is as much obliged, if called upon by the master, to assist in navigating the ship as the carpenter, he is to be deemed a mariner,” so in this case, the purser has signed the mariner’s contract, but that is not so much to settle the rate of wages as to point out the voyage, and enjoin the party who signs the contract “to obey all lawful commands.” And Sir Dudley Ryder adds: “upon considering all the

<sup>1</sup> See *The Lady Campbell*, 2 Hagg. Adm. R. p. 14, note.

<sup>2</sup> 2 Rob. 241.

<sup>3</sup> 1 Hagg. Adm. R. 378. See *The Jane and Matilda*, ib. 187, as to a female sailor. Also see *The Harvey*, 2 ib. 79.

<sup>4</sup> Abbot on Shipping, (Shee’s Ed.) p. 588.

<sup>5</sup> P. 136.

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The Prince George. 3 Hagg.

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cases, we are of opinion, that the privilege of suing in the Court of Admiralty for wages, does extend to every person employed on board a ship, except the master." And it was also held in that case, that "a mariner may sue on a contract, made on land, not being under seal."

The policy of the law has been referred to. Now 5 and 6 W. IV. c. 19, which passed shortly after this vessel had sailed, shows the present policy of the law very strongly, and that it corresponds with the state in which it existed, in the case before Chief Justice Ryder, to which I have referred. The object of that statute is to protect the mariner, and give him a security on the ship; the contract is intended for his protection; and I repeat, that the penalties connected with it are imposed on the master, none on the seaman. But it

is said there may be a fraud on the mortgagee. The [ \* 380 ] \*purser, however, was a necessary officer upon this voyage; he was not a privy to the mortgage; his agreement was made with the master and sole owner, and it was an agreement which might well be for the benefit of the ship and of all interested in her, whether as owners or as mortgagees. This resistance, then, seems to me an experiment by the mortgagee to create delay; but I trust that after what has been stated, the wages will be paid: the bail is liable to them and to costs, and perhaps to interest also. I admit the summary petition.

Upon this petition, the surgeon and the 3d mate were examined, and the agreement and handwriting of the master were proved; and on 13th February, 1837, an allegation on behalf of Mr. Campbell, the mortgagee, was opposed. The substance of this allegation is set forth in the judgment.

SIR J. NICHOLL. I should have been glad to have had a case cited, in which a mortgagee has been allowed to contest a suit for mariners' wages. A mortgagee may have an ultimate interest in the proceeds of a ship; but wages must stand first.<sup>1</sup> And what are the grounds in this case for resisting them? The first article of this allegation pleads; "that the agreement for wages (annexed to the summary petition) was made and executed at a counting-house in George Yard, London:" but that does not take it out of the admiralty jurisdiction; and the person with whom it was entered into was then [ \* 381 ] master and owner in possession, and he \* must be considered as the agent of the mortgagee, and that his acts bind him;

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<sup>1</sup> See The Dunvegan Castle, *sup.* 329.

nor is this agreement invalid by 5 & 6 W. IV. c. 19, the 5th section of which statute favors in particular the remedies of a mariner for his wages. The services of this man were engaged as purser; and it is alleged that he was to procure freight and passengers; but he was employed in the service of the ship; and when he signed articles, he became, like all the others, subject to the discipline of the ship, and was bound to obey all lawful orders.

The second article pleads, "that it was his duty as purser to keep accounts of the stores and provisions, and to deliver them out for the use of the troops, passengers, and crew, and that this duty was chiefly performed by the first mate, and only in part by Vokes;" but with 250 troops, (besides passengers,) assistance may have been necessary. It goes on to plead, "that these accounts were kept incorrectly, and were at variance with those of the mate; that a deficiency was found in the provisions, particularly in peas; that the master required Vokes to deliver up his papers and accounts, which he did; that the mate's were found correct and Voke's erroneous, and that from that time he ceased to act as purser, and came home as a passenger."

But is the court now to rip up these accounts? and if it were, how would it be able fully to investigate them, and to ascertain whether the mate or the purser was most correct, or whether there was any extravagance? The outward voyage was long; and it is not alleged that the troops complained, nor is it even now suggested that the master and owner suspended him for neglect of duty; he \* continued on board till the crew were discharged, and there [ \* 382 ] is no notice of a dissolution of this agreement alleged.

The third article pleads, that the usual wages are 2*l.* a month to a purser; but what usage can apply where there were 250 troops, and the outward voyage lasted 10 months; where there was a considerable freight; and there were passengers and cargo on the return voyage, which may have been procured by the exertions of Vokes?

The fourth article pleads "that the master has since become a bankrupt, and that Mr. Campbell, for himself and other mortgagees, has sold the ship, and that the produce is not sufficient to pay the whole of the mortgagees." But this sale, behind the back of the seaman, cannot avail, and it was a sale for "himself and other mortgagees," so that Mr. Campbell may have no interest. I am of opinion, that this allegation would not be a defence to this suit, even if it had been set up by the master and owner, still less when set up by a mortgagee, and I reject it with costs, as a useless expense, to which a mariner should not be exposed.

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The Dantzic Packet. 3 Hagg.

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On this day, (2d May,) the court being of opinion that the facts, stated in the summary petition were proved, pronounced for the wages with costs.

On the 24th of May, it was stated that at the date of the above decree the purser was dead; and that the mortgagee refused to pay the nephew and administrator; and accordingly, on motion by *Addams*, the judge was prayed to rescind the conclusion of the cause, and subsequently to pronounce the wages to be due [ \* 383 ] to the purser's \* estate, and to decree the same, with costs, to the administrator.

PER CURIAM. If I should make a decree to that extent, may it not affect the costs, which have not yet been taxed? I will now rescind the conclusion; the cause will then stand for sentence on the next session, when I will make a further order, if required.

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\* DANTZIC PACKET, Tanner.

May 10, 1837.

Prior salvors have no right in themselves, while the master is in command, to interfere with further assistance, and to attempt to exclude subsequent salvors; and such misconduct diminishes their title to salvage.

In derelict, the first occupant, if equal to the service, has a right of exclusive possession, subject to the rights of the crown or owners.<sup>1</sup>

THIS was a claim, on the part of three smacks, three galleys, and a barge, for salvage to a foreign brig of 239 tons, and her cargo, on the West Knock sand. Bail was given in 600*l*.

*Phillimore* and *Addams*, for the smacks, &c.

*King's Advocate* and *Nicholl*, *contra*.

SIR J. NICHOLL. The protest states, that as this Prussian vessel was proceeding on her voyage to London, on the 7th of January, in charge of a pilot, and towed by a steamer, the boiler burst, and the

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<sup>1</sup> [As to second set of salvors, see *The Maria*, Edw. 175.]

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The Dantzic Packet. 3 Hagg.

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brig struck heavily, about half past ten, A. M., on the West Knock sand; that she hoisted a signal of distress, and assistance came to her from the Essex coast; that she had eleven feet water, and "her situation was very perilous;" the wind blowing strong from W.

S. W.; that some of her \* cargo was put into the barge [\* 384] Eliza, and small vessels from Southend; and, by the assistance received from the shore, the pumps were kept going till the brig was scuttled, and the holes were afterwards stopped. That at six the next morning a steamer came to the brig's assistance, with two barges, into which the remaining cargo was discharged, and the steamer towed her off the sand, and to Sheerness.

Upon the showing of this protest, those who came to the brig "in her perilous situation," and rendered assistance at least till the next morning, would have been entitled to a liberal remuneration; and the barge is to be properly rewarded for the conveyance of part of the cargo to London; but there was no risk of life, and the title of the smacks to any reward will depend upon their subsequent conduct. Now Mr. Bentham, the Prussian vice-consul and agent to Lloyd's at Sheerness, states in his affidavit, "that he despatched a steam-tug, with a pilot, and also two barges, to the brig, and that he himself got to her by half past eight in the morning, the pilot being then on board; that The Essex men obstructed the loading of the barges, declaring that they should not be loaded unless they pleased; and they afterwards resisted the carrying off a hawser to attach the steamer to the brig, and on that occasion there was a scuffle."

This is highly improper conduct in these men, and their pretensions to the sole possession of this vessel, and that they are to be the sole salvors, are such as the court cannot countenance. Here were the master, the pilot, and the agent to Lloyds — representing the underwriters — all concurring \* in the necessity of [\* 385] further aid; the boats had failed in their endeavors to get the brig off, and whatever their intention was, as to the aid of other vessels from the Essex coast, no such vessels had come, and the brig might have become a wreck; these boatmen, therefore, had no right to exclude, or to assume a control over further assistance; their obstruction is quite at variance with the spirit of the Salvage Act; and it is a dangerous error, that salvors going to the assistance of a vessel in distress, acquire the sole management of her; they only act under sufferance and permission; and in this instance, from the time the steamer arrived, the boatmen were almost intruders. I do not say, that their subsequent misconduct will totally deprive them of reward; but their pretensions, in claiming to decide what was to be the extent of assistance, are quite unwarrantable; that was a matter not within

their province. It is different in the case of a derelict; there the first occupant has a vested interest, and a right of exclusive possession, if alone he can save the property; he takes possession indeed for the benefit of the crown, in the first instance,—but subject to a liberal remuneration.<sup>1</sup> Here I am at a loss, rather, to know what is the salvage service; certainly the final saving was effected by the steam-tug and the two barges. In *The Eleanora Charlotta*,<sup>2</sup> Lord Stowell held that the title of salvors to remuneration was not impaired by their quitting the ship; in this instance the boatmen continue [ \* 386 ] with the ship to Sheerness, and assist at the \* pumps, and even pay the barges, engaged by Bentham, as if they had the sole authority. If, then, there had been nothing to detract from the services of these men, the court would have been inclined to consider them as salvage services up to the brig's arrival at Sheerness; but I direct them to be repaid the 30*l.* which they gave to the craft; 30*l.* also I give to the barge *Eliza*, as liberal freight, and she was not present when the captain was obstructed; and I give 100*l.* among the rest, with their expenses.<sup>3</sup>

I hope it will be understood, that the master, so long as he retains the command, is fully entitled to regulate the *quantum* of assistance to be given to his vessel; and he may be extremely blamable if he does not avail himself of all that is at hand, and he may consider necessary.

<sup>1</sup> See *The Effort*, *supra*, 165. *The Brandy Case*, p. 257.

<sup>2</sup> 1 Hagg. Adm. R. 156.

<sup>3</sup> In *The Black Boy*, Devay, a dismasted vessel, while at anchor near Lowestoft, was boarded by a boat, and the boatmen would not quit, and proposed to carry her by jury-masts into Harwich, and obstructed the master and agent in taking her into Yarmouth by a hired steamer; the court, holding that the boatmen had effected no salvage service, and had misconducted themselves, pronounced for 30*l.* — the tender — as the boat had been employed in carrying the master and messages, and condemned them in costs from the time of their refusal.

Where three smacks piloted *The Funchal*, Baptista, (a Portuguese schooner, on her voyage with butter to Lisbon,) out of an unfrequented channel at the mouth of the Thames to the Nore, between 7 and 11, P. M.; — a fine moonlight, — the vessel uninjured; — preparing to anchor, knowing her situation; — and having refused 50*l.*, entered an action for salvage in 600*l.*; the court — further adverting to a doubt, whether the smacks could not have taken her into the Downs, said, that they had failed to make out a case of salvage; that it was at the most mere pilotage; and dismissed the suit, but without costs.

\* THE PRINCE OF SAXE COBOURG, Ladd. [ \* 387 ]

May 12, 1837.

A public advertisement for the sale of a bottomry bond by auction to the lowest bidder, at a foreign port, will not discharge a *bonâ fide* purchaser from the necessity of making reasonable inquiry as to the actual existence of "an unprovided necessity."

Such "an unprovided necessity" is essential to the validity of a bottomry bond, and therefore the want of it will render a bond void even against a *bonâ fide* lender, ignorant of all the circumstances.<sup>1</sup>

THIS vessel, chartered by Messrs. Rothschild & Co., of London, on a voyage from Cadiz to that port, with a valuable cargo of quicksilver, their property, sprung a leak at sea, and was compelled to put into the Tagus for repairs. On the 31st of May, 1836, she arrived off Belem, about four miles below Lisbon, and the master was there informed that Messrs. Finnie, Medlicott, & Co., of Lisbon, were the agents of Messrs. Rothschild & Co.; on the same day the clerk of a Mr. James, a merchant at Lisbon, went on board by his principal's orders, and not being able to see the master, who was ill, tendered James's services to the mate, saying he was informed that the vessel was not consigned to any house at Lisbon; the mate replied, that he would communicate his offer to the master, and appointed to meet the clerk on shore at Belem at ten o'clock, A. M. the next day. At six A. M. on that day, (1st June,) the clerk of Messrs. Finnie, Medlicott, & Co. came on board, saw the master, and informed him that the said firm were the agents of Rothschild & Co.; that he came by their order to take charge of the vessel, and that they would do every thing requisite, and make every advance necessary. The master replied, "that he was in the hands of Messrs. Rothschild's agent already;" on which the clerk communicated this to Mr. Medlicott.

Afterwards, on the morning of the same day, the clerk of Mr. James met the mate on shore, according to their appointment; who informed \* him that the master had desired him [ \* 388 ] to consign the vessel to Mr. James, and accompanied the clerk to the custom-house at Belem, where she was entered as consigned to James.

On the morning of the next day, the 2d of June, Mr. Medlicott went on board and explained to the master that he had been imposed upon by James, who wished to "make a job" of the business, and

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<sup>1</sup> [See The Jane, 1 Dod. 461, note.]



that Finnie, Medlicott, & Co. were the sole agents at Lisbon of Rothschild & Co.; whereupon the master requested him to take charge of the vessel and have the cargo discharged immediately, writing to James to inform him of it. Finnie, Medlicott, & Co. obtained the necessary orders at the custom-house, Lisbon, proceeded with the discharging, and when they had discharged about half the cargo, on the 3d of June, they received the following note from the master:—"Gentlemen, having yesterday afternoon consigned my vessel to Mr. Henry James, but now discharging under your directions, I think it just and fair, and it is my wish to consign the vessel to him, and the business to be done between the parties."

Upon this Medlicott had a second interview with the master and with James, to whom he explained the impropriety of their conduct, and who then explained to him that a commission must be charged, which might be divided by his house and James, and that this was what they meant by the "business to be done between the parties." Medlicott replied that his house never charged any commission to Rothschild & Co., but that it would "make every necessary advance," and "pay all expenses necessarily incurred."

[ \* 389 ] \* On the following morning, the 4th of June, when Finnie, Medlicott, & Co., were preparing to proceed with the discharge of the cargo, the master sent back their lighters, with a note stating that "he had seen Mr. James yesterday, and agreed with him to go on to discharge the vessel, and he considered if they had made all things comfortable, the work would have gone on right."

The subsequent discharge of cargo and repairs were done by James, and on the 17th June, the master wrote to Finnie, Medlicott, & Co., stating "that he could not obtain the amount required either on his personal security, or on that of his owners," and requesting to know whether, as agents of Rothschild & Co., they would, "advance the amount required on their account, to defray expenses of repairs and other customary and usual charges incurred, to enable him to proceed without delay." They replied, that they were "ready to pay, on examination of his accounts, such expenses and charges for repairs as would have have been made by them, had he not taken the business out of their hands, on condition that he made his freight responsible for whatever expenses should belong to the vessel."

The master replied, that he would submit his accounts to their inspection, and make his freight responsible for any proportion it might be liable to, and repeated his request that they would "advance him on account of the owners of the cargo, the means of defraying the expenses incurred, in order to avoid the additional expense of a bottomry bond." Finnie, Medlicott & Co. answered this by repeat-

ing their former offer refusing to pay any commission to James, "as none \* would have been charged by them," and [ \* 390 ] said that "a bottomry bond was entirely his own seeking, as they had made him perfectly aware that nothing of the kind would be required by them."

Two days after the master received this answer of Finnie & Co., he, on the 22d of June, caused an advertisement to be inserted in a Lisbon newspaper, that a bottomry bond for the sum in question would be sold by auction on the Exchange to the lowest bidder on the 23d of June.

The sale took place at the time and place appointed; there were several bidders, and Messrs. Le Cesne, Guillot & Co. became the purchasers at six per cent. They made no previous inquiry either of the master, of James, or of Finnie, Medlicott & Co., nor did the latter firm give them or others any notice, or take any further step in matter. The bond was duly executed, the money paid to the master, and the vessel arrived safely at London. The bond was put in suit by the London agent of Le Cesne, Guillot & Co.

*Nicholl*, for the bondholders. Here was an unprovided necessity when the money was lent; it was advanced at a public auction, where, amongst many bidders, the lender was the lowest. The owner of the vessel had no agent at Lisbon, and there is nothing to show that the risk of the voyage was on Rothschild & Co. Finnie & Co. refused to advance any money beyond the cost of the repairs; they would not release the vessel and enable her to sail. The commission is proved to be customary at Lisbon. The master may have acted improperly in putting her into James' hands, but he is held out at \* Lisbon as the registered consignee, and he [ \* 391 ] would not allow her to sail until he was paid. Nor can any misconduct of James' affect an innocent third party, who advances the money after a public advertisement, Finnie & Co. taking no step whatever to prevent it. The lender has no privity whatever with James, and I put the case on this ground, that unless this bond had been given, and Le Cesne & Guillot had lent their money upon it, the vessel could not have been released. The *Jane*, 1 Dod. 461; *Ysabel*, *ibid.* 273; *Nelson*, 1 Hagg. Adm. R. 169; *Zodiac*, *ibid.* 323.

The *King's Advocate, contra*. James, as well as the master, was informed by Finnie & Medlicott before any thing had been done by him, (James,) that they would advance all the money necessary for the repairs, without charging any commission; therefore it is clear that the transaction was fraudulent in its very commencement. If

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The Prince of Saxe Cobourg. 3 Hagg.

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James's conduct was so wrong, how can it be contended that this is an honest transaction? There was certainly no unprovided necessity; and if not, the bond is altogether void as against all parties; nor will the purchaser by advertisement, or the ignorance of the lender, make it a valid bond. An unprovided necessity is absolutely indispensable in all cases. The *Augusta*, 1 Dod. 283, and several others recognizing the same principle.<sup>1</sup>

SIR J. NICHOLL. This question must be decided by the circumstances of the transaction and the principles applicable to [ \* 392 ] them. The right of the master to \* take up money on bottomry is "*stricti juris*," arising out of unforeseen necessity; he is not the owner even of the ship, much less of the cargo, and he cannot bind either the owner or part owners of this property, or give a preference to one creditor over another but under special circumstances, and for the general interest of all parties in the protection and preservation of the whole. And in the first place, this necessity must arise in the course of, and for the purpose of continuing, the voyage. 2dly. It must be, generally at least, in a foreign port where repairs and supplies have become necessary. 3dly. The master's power of borrowing on bottomry must arise on account of his having no other credit or means of obtaining money upon the credit of the property. The principles indeed are so familiar, and are so clearly laid down by Lord Stowell in *The Nelson*,<sup>2</sup> that it is scarcely necessary to repeat them. It is clear that there must be a strong necessity; that was decided in the case of *The Eliza*, by the Judicial Committee of the Privy Council;<sup>3</sup> and the principle was fully recognized by this court, although it viewed the facts of that case differently.

What then are the facts of this case? This vessel, hired by Rothschild & Co., in London, coming thither from Cadiz with a valuable cargo on account of that firm, springs a leak and puts into Lisbon to repair. She first stops at Belem, four miles from Lisbon, on the 31st of May; and the master is there apprised that [ \* 393 ] Finnie & Co. are Rothschild's agents; James sends his \* clerk to Belem to tender his services; the master is ill, but through the mate he consigns himself to James, who enters himself at the custom-house as consignee of the ship, probably in consequence of a message from the master conveyed by the mate. Now the ship was hired by Rothschild & Co., and the master was at first informed

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<sup>1</sup> See *The Dunvegan Castle*, *supra*, 331.

<sup>2</sup> 1 Hagg. Adm. R. 175. Also *The Hersey*, *infra*, p. 404.

<sup>3</sup> *Heathorn v. Darling*, 1 Moore's P. C. Cases, p. 5.

that Finnie & Co. were the agents of that firm, and he is told by them that he can obtain without difficulty whatever amount might be necessary to repair the vessel and to enable him to go on with the voyage: but he and James will undertake the matter, and put the parties to the most extraordinary expense. It is not necessary to stop to inquire whether the master had any other credit. Lisbon, however, is not an obscure port; if large repairs were necessary, he might have communicated with either the owners or the charterers in London; for it was in the midst of summer, and there was constant communication by steamers. Nor is it necessary to examine the items of the charges; but it may be observed, that James and the master make up the account. At last James will not advance the money, and instead of taking a bottomry bond himself, he and the master advertise for a loan on bottomry a whole month after the matter had commenced, and this bond is purchased by these merchants, who had no part in the expenses, who knew nothing about the necessity of repairing, or about the propriety of the charges. But purchasers of any article are bound to look to the sellers from whom they purchase. The whole from beginning to end was contrived and arranged between James and the master, and finally this sale of a bottomry \* bond was their doing. The whole vice of the [ \* 394 ] argument for the bondholder is that the holder is an innocent purchaser; but it was the duty of the purchaser to have made inquiry; Le Cesne & Co. may have bought a bad bottomry bond, or have lent their money on a fraudulent security, but they have done it without inquiry, and this circumstance cannot alter the nature of the transaction. Again, it is said that James would not have allowed the vessel to sail had he not been paid; but there could have been no real difficulty in getting her released upon giving security to answer the demand. There is, in my opinion, no ground whatever for viewing this as a legal bottomry bond; and I will try to put a stop to the sale of bottomry bonds; that is not the principle on which they should proceed. I pronounce against the validity of the bond with costs.

From this sentence an appeal was prosecuted to the Judicial Committee of the Privy Council, and the case was argued by *Sir W. W. Follett* and *Dr. Addams*, for the appellants; and the *Queen's Advocate* and *Dr. Harding*, for the respondents; and their lordships affirmed the sentence with costs.

## THE LONDON MERCHANT, Laker.

May 31, 1837.

Salvage to a valuable steamer, with passengers, on the rocks inside of Holy Island. Con-joint services of 150 boatmen (paid by agreement) and a steam-tug, and an officer and five men of the coast guard. Award affirmed, with costs, save as to the five men.

THIS was a cause of salvage for services rendered to the steam-ship London Merchant, (belonging to the General Steam Navigation Company,) by the steam-vessel Majestic, of Hull, and in [\*395] which a separate action having been entered \*for Lieutenant Dooley, (and five men under his command,) of the coast guard, the two actions were consolidated.

*King's Advocate* and *Nicholl*, for The Majestic.

*Phillimore* and *Addams*, for Lieutenant Dooley.

*Burnaby* and *Haggard*, for London Merchant.

SIR J. NICHOLL. This steamer, of 330 tons burden and 150 horse-power, with a crew of twenty-seven men, and having on board twenty passengers, a cargo of manufactured goods, butchers' meat, and 350 barrels of ale, sailed from Leith at four P. M. of the 17th of December. Upon this statement I may observe, that, in a salvage service, the primary ingredients and objects are the lives and property in jeopardy; but the risk of those employed, and the length of time, are also to be considered. The facts, to the time of the accident, and the measures adopted till the steamer was upon the rocks in the Narrows, inside of Holy Island, may be taken from the affidavit of the master. The affidavit is not impeached as to the early part of the transaction. He says, "that at about seven P. M. he went below to lie down, leaving the chief mate in charge of the ship, with directions to call him (Laker) about nine; that he, Laker, was not called until about eleven, and he thereupon immediately went upon deck, when, perceiving the ship to be close in with the land, in the narrows inside of Holy Island, he instantly called to the man at the helm to keep her away, and to put the helm hard a-starboard; that such order was promptly obeyed, and the ship turned her head [\*396] \*about half a point, but too late to prevent her running on a reef, and between two rocks, at the north end of Holy

Island, about sixty or seventy yards from the beach; that the engines were immediately stopped, and the ship, although she had in great part passed over the reef, remained fixed thereon near her stern; that efforts were then made to force her off; but as the tide had then ebbed about half an hour, the same were unsuccessful, from there not being sufficient water; that it was a fine moonlight night, with moderate weather, and the wind off the land, being about west by south; he then determined to procure assistance from the shore."

Now, what says the protest? It was signed by the master at Berwick, on the 22d of December, and is always an important document<sup>1</sup>:—"Valentine Laker, master of the steam-vessel *The London Merchant*, of London, of the registered burden of 187 tons, saith, that he left Leith in the said vessel, on Saturday, the 17th instant, for London, with a general cargo; that during the watch of the chief mate, at about eleven P. M., the vessel struck upon a ledge of rocks, off Holy Island, known by the name of the 'False Emanuel Head;' that she remained there until the next day about twelve, when, by great exertions, she was got off; that about eleven A. M. of the 18th, a swell caused the vessel to strike heavily, and she then began to make a little water, which, on getting the vessel off the rock, increased so rapidly \* as to require a crew of fifty-four men [ \*397 ] to be immediately employed at the pumps, where they remained constantly from that time until six on Tuesday morning, when the leak was so stopped as to require only six men, in addition to the crew, to keep the water under; that about three P. M. of the 18th, the said vessel was removed into shoal water, in the harbor of Holy Island; that the light goods were removed on the afternoon of the 20th and 21st, into *The Soho* steam-vessel, in which they were sent to their port of destination; that the remainder are still on board; that about eleven P. M. of the 21st, the vessel was removed, with the assistance of *The Soho* steamer, to Berwick, where she arrived about four o'clock this afternoon; that she now lies on the shore in the Tweed, in the port of Berwick."

By the master's own showing, his vessel had been in imminent peril; she required constant working at the pumps, and great exertions, to get her off, and sustained so much damage that she also required temporary repair before she could be removed to Berwick, a distance of about nine miles. The vessel had struck heavily on the rocks; her rudder was unshipped; her steam-pipes were displaced,

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<sup>1</sup> It was certified by the notary public to be a true copy of the entry of protest made before him; but it was objected to, as not having been sworn nor extended.

and her engines useless till she got into harbor. Fortunately the weather, while the steamer was on the rocks, was moderate; but the conduct of the master and others on board, is the best proof of the danger. How it happened that, on a fine moonlight night, the vessel should have got out of her course, and into such a situation, I am at a loss to conceive, unless the mate, who had been in command, [ \* 398 ] was in liquor; and \* Lieutenant Dooley says that that when he came to him he was intoxicated. The vessel was no sooner known to be in her perilous situation, than steps were taken to release her; and Lieutenant Dooley, the officer in command of the coast guard at Holy Island, was sent for. Captain Milne, a naval officer, one of the passengers, wrote, by the master's desire, both to Lieutenant Dooley and also to the owner of a steam-tug at Berwick, for assistance as soon as possible; and for the same purpose an express was despatched to the agent of The London Merchant. But it is not only Lieutenant Dooley, but all the pilots and fishermen of Holy Island are roused soon after midnight, and go out to this stranded vessel.

The harbor-master, it seems, with the concurrence of the boatmen, made an agreement with the master of the steamer that they should receive 150% for their assistance. Whether, if they had chosen to stand on their legal rights, and abandoned this agreement, their services would have met with a different consideration, it is not necessary to inquire; they are not claimants as salvors; they have received the money according to their agreement; and this consequence seems to have followed, that the owners, agent, and master are strongly biased, and see the merits of these boatmen with a prejudiced eye.

The present suitors, however, were the parties anxiously applied to; and they acted with great alacrity. Lieutenant Dooley exerts himself; he stations his men, in order to guard the property from plunder, in case it should be necessary to land any part of it. That was his [ \* 399 ] first duty. He \* then goes on board himself; he imparts comfort and confidence to the alarmed passengers; he superintends and countenances the proceedings. It is true, he does not afford much personal assistance. That was unnecessary; the services of the harbor-master, boatmen, and pilots had been agreed for; but still he is to be considered as a salvor, and entitled to remuneration.

The claim of the steam-tug stands on much higher ground. She was expressly sent for, and came with all alacrity; and her services were two-fold; first, in getting the vessel off the rocks; and secondly, in towing her into port, and for that purpose her ordinary power was increased by putting an additional weight on the safety-valve—a measure which was attended with some risk to the machinery and

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The London Merchant. 3 Hagg.

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to the lives of her crew. By the efforts of this tug, and with the assistance of an anchor carried out from The London Merchant, and of her own crew, this valuable vessel was got off; but when off, the service of the steam-tug was not completed, it not being pretended that the boats were employed in towing, or that without towing this vessel could have been got into harbor. It was an ebb tide, and the wind from the shore; so that there was some danger that she might have been carried out to sea, or sunk in deep water; for she had sprung a heavy leak, and constant pumping was required, and the fact of another steamer being sent for, shows that there were apprehensions for her safety.

The vessel was two miles from the harbor, and for an hour the tug was the sole tower, and had carried her three quarters of the distance before any attempt was made to hoist sails. The boats \* had nearly got to the shore, when signals were made for [ \* 400 ] their return; and it is, I think, more probable that the crews were wanted to work at the pumps, than to assist a crew of twenty-seven men in hoisting a few sails; but, even for the remaining half mile, the steam-tug was employed in towing the vessel; and how, indeed, sails, with a wind out of the harbor, could be of any avail, I cannot quite understand. When the vessel was in the harbor, what was her state? She remained till Tuesday; she underwent considerable repairs, and then only went to Berwick, and that with the assistance of The Soho. The court regrets to see the discrepancies between the affidavits and the protest; but, without further noticing them, I am quite satisfied that a considerable reward is due to the salvors. Here is a property, valued at 12,000*l.*, which has been saved, and a tender of 50*l.* to the tug, without any offer to Lieutenant Dooley. It is by no means free from doubt, whether this property would have been got off at all without the assistance of the tug; or, if off the rocks, whether she could have got into the harbor with an adverse wind.

A great steam navigation company is peculiarly bound to encourage salvage assistance; they owe it to the public; they are particularly engaged in carrying passengers; they are large contractors for carrying the mail; for so Mr. Hamilton, their agent, informed Lieutenant Dooley. It is, then, also peculiarly their duty to be careful in the appointment of their officers, of all gradations; but here the master, within a few hours after quitting Leith, went to bed, leaving the vessel in charge of his mate, upon whom there is a suspicion \* that he was intoxicated; and who, on a fine moonlight [ \* 401 ] night, runs her upon rocks.

When steamers render assistance, they are considered as entitled



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The Percy. 3 Hagg.

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to liberal rewards. Suppose that this steamer had rendered assistance to a valuable merchantman upon these rocks, would this company have been content with 50*l.*, the amount of their tender? <sup>1</sup> The steam-tug, it is true, is small, (but of what value does not appear,) and she was not long employed, but I do not think that 400*l.* is too much for her services; — services which contributed most materially to the release of this vessel; and in respect to Lieut. Dooley, he acted with promptitude and alacrity, doing his duty, and indeed more than he was bound; and I give to him and to his men 100*l.* These sums, even with what has already been paid to the boatmen, amount to little more than five per cent. upon the property. Costs as usual.

The above sentence was affirmed with costs, save as to 5*l.* to Lieut. Dooley's five men.

*Sir W. W. Follett* and *Dr. Burnaby* for the appellants.

The *Queen's Advocate* and *Lushington* for the steam-tug; and *Phillimore* and *Addams* for Lieut. Dooley and the men under his command.

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[ \* 402 ]

\* PERCY, Tanner.

November 3, 1837.

A monition, to bring in freight, refused to a mortgagee of a ship, the ship having been sold at defray a bottomry bond secured upon ship and freight, and where a warrant of arrest had been served upon the freight at the suit of the bondholder, and there were owners before the court; held also, that the mortgagee could not bar payment of the bond out of the proceeds of the ship, until the freight was in the registry.<sup>2</sup>

IN November, 1836, a warrant of arrest, in a cause of bottomry,

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<sup>1</sup> April 25, 1837.

Salvage to a dismasted vessel off the French coast. Conjoint services of three fishing boats and a steamer; award to the latter of one fifth of the value saved.

In The United Kingdom, (Allen,) of London, of 450 tons, and eighteen hands, which, bound to Jamaica, got on a sand, on 3d December, off Wissant, ten miles from Calais, and where the consul could not, until the 7th, from the state of the weather, prevail upon any steamer to go out to her, she being without a rudder and dismasted, (but in the mean time had received some assistance by three fishing boats,) and on that day The Britannia steamer, valued at about 6,000*l.*, and engaged for the purpose, brought her into Calais; there was an award to the steamer of 800*l.*, being one fifth of The United Kingdom.

<sup>2</sup> [This case is doubted by Dr. Lushington, in The Dowthorpe, 2 W. Rob. 73; and in the Fortitude, 2 W. Rob. 221. See Leland v. The Medora, 2 Wood & Min. 92.]

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The Percy. 3 Hagg.

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having been executed on the ship, and also on the West India Dock Company in regard to the freight, and no appearance given, the ship was ultimately sold, under a decree of court, and the proceeds, 1,052*l.* 8*s.* 10*d.*, paid into the registry; the bond was for 452*l.* 13*s.* 4*d.* An appearance was then given for two merchants at Cuba, as owners of the ship, and claiming the balance of the proceeds; and on the same day there was an appearance also for Mr. Read, alleging him to be a mortgagee of one fourth of the ship, by assignment from Gerard, while the ship was at sea, for a debt of 400*l.*; and on his behalf, and upon his affidavit, in which he stated that the legal property was in Gerard, and also that he had no right to the freight, the court was moved to decree a monition against the secretary of the West India Dock Company to bring in the freight; but the court—observing that it was an attempt, by an intervener, to introduce a new practice, and to raise a question between a mortgagee and the owners of a ship,<sup>1</sup> a mortgagee being a stranger to its jurisdiction unless under special circumstances—made no order; but intimated that the bondholder might apply.

An appearance was then given for Mr. \* Howden, alleging [ \* 403 ] him to be mortgagee in trust, for himself and others, of one fourth of the ship and freight; and, on the part of the two mortgagees, caveats were entered against the payment of the proceeds to the bondholder; and on this day an application was made that the court would direct the amount of the bond, with interest, to be paid to the bondholder; while Mr. Read applied that there should not be such a decree, until the freight shall have been brought into the registry, in part discharge of the bond.

*Haggard*, for the bondholder.

*Nicholl*, for Mr. Read.

SIR J. NICHOLL. No objection is made to the bond; and there is sufficient to discharge it out of the proceeds in the registry; the freight is part of the bondholder's security; but he is not compellable here to enforce it. I am not aware that this court has taken up questions of this kind as between mortgagees and owners; if it is bound to enter upon them, the mortgagee should get an injunction to bar the payment of the existing proceeds to the bondholder; but.

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<sup>1</sup> See *The Portsea*, 2 Hagg. Adm. R. pp. 84, 88, and note; also *The Prince George* *supra*, p. 376; and 3 & 4 Vict. c. 65, ss. 3, 4.

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The Hersey. 3 Hagg.

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unless the court is so stopped, I adhere to the opinion that he is entitled to have his bond and interest paid out of the sale of the ship, and that a mortgagee has no right to impede the payment.

Application, by mortgagee, rejected.

[ \* 404 ]

\* HERSEY,<sup>1</sup> Grimwood.

November 27, 1837.

To render a bottomry-bond valid, there must be a double necessity; first, a necessity of obtaining supplies in order to prosecute the voyage; secondly, the impossibility of obtaining those supplies in any other way than by an hypothecation of the ship.

A bottomry-bond, given at Hobart Town, (under a threat of arrest, by the owner's agent, and for whose benefit, at least in part, the bond was entered into,<sup>2</sup>) on the day before the vessel sailed, and reciting that it was to enable the master to pay for "necessaries supplied for the intended voyage, and for the use of the brig," such bond not having been conditioned for previously, pronounced against, with costs.

THE Hersey sailed on her voyage from Leith in March, 1834, on a general trading voyage; and the question in this case was as to the validity of a bottomry bond, bearing date the 4th of November, 1835, entered into by the master, at Hobart Town, in the prosecution of her voyage to England. The ship arrived in London, and these proceedings were commenced by the Messrs. Gore, the attorneys of the bondholder. The bond was, in substance, as follows:

"Know all men, &c., that I, Joseph Grimwood, master of the brig The Hersey, of London, of the burden of 168 two ninety-four tons, now at her moorings in the river Derwent, off Hobart Town, for myself and James Gardner, of London, merchant, and James M. Baird, of Old Burlington-street, in the county of Middlesex, ship owner, owners of the said brig, am bound to Thomas Hewitt, of Hobart Town, merchant, in the sum of 940*l.*; for the payment of which said sum to Thomas Hewitt, his executors, &c., I hereby bind myself, &c., &c. In witness whereof I have hereunto set my hand and seal, this 4th of November, 1835."

"Whereas the said J. Grimwood is upon the point of proceeding to sea in The Hersey, with a cargo of merchandise from this port to the port of London; and whereas he is justly indebted to persons in

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<sup>1</sup> [S. C. on Appeal, 3 Moore P. C. R. 79.]

<sup>2</sup> [The Augusta, 1 Dod. 283.]

The Hersey. 3 Hagg.

Hobart Town in sums of money amounting altogether to 470*l.*, or thereabouts, \* for provisions and other necessities [ \* 405 ] supplied in and on board the said brig, for the support of her crew, and for supplies for the intended voyage, and also for necessities supplied for the use of the brig, and which said sum he is unable to pay; and whereas the said Grimwood, being unable to pay and discharge such sum of money, or to negotiate his bills of exchange upon the owner of such brig, or otherwise to raise money for the payment of the said sum, hath applied to and requested Thomas Hewitt to lend and advance the sum of 470*l.*, upon bottomry of the said brig, at the rate of 20*l.* per cent., for the voyage from the port of Hobart Town to the port of London, for the purpose of enabling him to pay the said debts, and which the said Thomas Hewitt hath consented and agreed to do; and whereas the said Grimwood hath this day taken up and received of and from the said Hewitt the full and just sum of 470*l.* sterling, which sum is to run *ad respondentia* upon the block and freight of the brig Hersey, from the port aforesaid on a voyage to the port of London, having permission to touch, stay at, and proceed to all ports and places within the limits of the voyage, at the rate or premium of 20*l.* per cent. for the voyage; in consideration whereof, the usual risks of the seas, rivers, fires, enemies, and pirates, are to be on account of the said Hewitt; for the further security of the said Hewitt, the said Grimwood, as such master, doth by these presents mortgage, hypothecate, and assign over to the said Hewitt, his executors, &c., &c., the said brig, and also her \* freight, if any, payable, together with her tackle, apparel, [ \* 406 ] and appurtenances; and it is hereby declared, that the said brig and her freight is thus assigned over for the security of the said *respondentia*, and shall be delivered to no other purpose whatsoever until payment of this bond is first made, with the premium due thereon. Now the condition of this obligation is such, that if the above bound Joseph Grimwood, his executors, &c., &c., shall and do well and truly pay, or cause to be paid, to the said Hewitt, or to his attorney in London, legally authorized to receive the same, his executors, &c., &c., the full and just sum of 564*l.* being the principal of this bond, together with the premium, which shall on arrival become due thereupon, at or before the expiration of six days after the safe arrival of the said brig at her moorings in the river Thames; or, in case of the loss of the said brig, such an average as by custom shall have become due on the salvage; then this obligation to be void and of no effect, otherwise to remain in full force and virtue.

“Signed, sealed, and delivered in the presence of

Jos. Grimwood, A. J. Stracey, Robert Gosson.” [SEAL.]

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The Hersey. 3 Hagg.

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The execution of the bond, and the signatures, were duly verified.

*Addams*, for the bondholder.

*Nicholl*, *contra*.

SIR J. NICHOLL. This is a suit for the purpose of enforcing payment of a bottomry bond, given by the master of The Hersey at Hobart Town. The bond bears date the 4th November, 1835, [ \* 407 ] and the amount \* for which it was given is 470*l.* principal, besides interest, at the rate of 20*l.* per cent., making together 564*l.* The Hersey sailed from the port of London in the early part of 1834, and returned in March, 1836; and the bond not being paid, a suit commenced in this court by arresting the ship. The owners have resisted payment on the ground that the bond is invalid, as no sufficient necessity existed for hypothecating the ship and freight. It thus became requisite, in support of the bond, to send to Hobart Town for affidavits and accounts in verification. Time was accordingly allowed, which has, of course, delayed the proceedings; but this was necessary for the purposes of justice; and upon the affidavits and documents exhibited on both sides, the whole case is now before the court.

The question is, whether there existed a sufficient necessity to authorize the master to borrow money on bottomry, and to hypothecate the ship; for that is the true principle on which the court proceeds in enforcing payment of bottomry bonds.<sup>1</sup> The master is not the owner of the property so as to have a right to bind it at his own will and pleasure. He is not to hypothecate without a necessity; for the hypothecation may be unjust, not only as it affects the property of his owners, but by giving a priority of payment to one creditor, and thereby operating to the injury of other creditors and of mortgagees;<sup>2</sup> for if the hypothecation be valid, it has a preference [ \* 408 ] ence to all \* other liens, except seamen's wages. Hypothecation, therefore, can only be valid if bottomed on necessity, and that necessity must be twofold; first, a necessity of obtaining supplies in order to prosecute the voyage; and, secondly, the impossibility of obtaining those supplies in any other way than by an hypothecation of the ship itself; for if they can be procured upon the

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<sup>1</sup> See *The Dunvegan Castle*, *supra*, 333; *The Prince of Saxe Cobourg*, *supra*, 387; *The Orelia*, *ib.* 75.

<sup>2</sup> See *Duke of Bedford*, 2 Hagg. Ad. R. 294.

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The Hersey. 3 Hagg.

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credit either of the master or of the owners, or by advances on the freight, or by passage-money, or upon any other credit than the hypothecation of the ship, the bond of hypothecation is absolutely void. Necessity, as was expressed by Lord Stowell in the case of *The Nelson*,<sup>1</sup> is the vital principle of hypothecation bonds, and the absence of that necessity is their undoing; it is the destruction of the bond itself. Such is the principle laid down by Lord Tenterden, in his book on Shipping, by Mr. Holt,<sup>2</sup> and by other writers; and the principle is supported by various decisions in this court, and very strongly by the case to which I have just referred, and also by the case of *The Hero*,<sup>3</sup> which was cited in argument. It becomes necessary, then, to consider the history of this voyage by the master, and the transactions which occurred in the course of it.

The *Hersey* was a new brig, and therefore not so liable to be affected by the accidents which happen in a long voyage, as an old vessel. She was the property of Messrs. Gardner, Urquhart & Co., a mercantile house in London, known at Hobart Town; and she sailed from this country \* on a trading voyage to the [ \* 409 ] coast of Africa, the Mauritius, and back again on freight to London. Joseph Grimwood was appointed master for this voyage. He was a person acquainted with, and was also known at, Hobart Town, for he had been there on a former voyage, as master of *The Princess Royal*, and had there granted a bottomry bond on that ship, to the same persons as appear in connection with the present bond. The cargo of *The Hersey*, on the outward voyage, consisted partly of goods on freight and partly of goods belonging to the owners. In February, 1835, being at the Cape of Good Hope, Grimwood, with part of the proceeds of his owners' cargo, fitted out the vessel for a voyage to Van Diemen's Land, with wine on freight, and partly with the other part of the owners' cargo. In April he arrived at Hobart Town, and placed himself and his concerns in the hands of Mr. Orr, as agent, who received the freight and proceeds of the goods landed and sold, and with the remainder of the cargo the master went on, in May, to Sydney. Before the master quitted Hobart Town, Mr. Orr rendered to him an account current, in which he gave credit for 185*l.* 13*s.* 6*d.*, the amount of freight, and 61*l.* 9*s.* 2*d.*, the proceeds of goods sold; but, on the other hand, he had made advances to the master for the use of the ship, leaving a balance in her favor of 7*l.* 1*s.* This money, however, was not paid to the master. At Sydney, the master disposed of the remainder of the owners' cargo, amounting to

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<sup>1</sup> 1 Hagg. Ad. Rep. 169.

<sup>2</sup> Shipping and Navigation Laws, p. 234.

<sup>3</sup> 2 Dod. 189.

nearly 300*l.*; of this sum, he expended 100*l.* in the purchase of coals; and, having taken in a few goods on freight, returned to [\*410] Hobart Town, where he arrived in \* August, and again placed himself under the agency of Mr. Orr. Whilst there he obtained a cargo of oil on freight to London, and likewise a good many passengers, for the freight and passage-money amounted to about 800*l.*, and upon that sum Mr. Orr has charged a commission at five per cent. for his assistance in procuring them; that appears from the accounts. The master continued at Hobart Town, in full communication with this agent, for nearly three months. On the 27th of October the vessel was ready for sea; but the excuse of the master for not sailing, is, that he was not able to procure the accounts from Orr, though Orr complained that the vessel was eating her head off; and it is not until the 3d of November, the day before the vessel sailed and the bond was executed, that the accounts were rendered. The accounts are annexed to Mr. Orr's affidavit; and in one account, headed "Captain Grimwood and Owners Hersey, in account current with William Orr, 1835, November," are these entries — "To cash paid disbursements of brig Hersey, at Hobart Town, as per account, 256*l.* 5*s.* 11*d.* To five per cent. commission on freight and passage-money procured per brig Hersey to London, (amount 806*l.* 17*s.* 9*d.*.) 40*l.* 6*s.* 10*d.* To balance, 28*l.* 15*s.* 7*d.*" So that, according to this account, there was a balance due to the ship of 28*l.* 15*s.* 7*d.*; and it is expressly sworn, (and it is an extraordinary fact,) that this balance was actually paid to the master by Orr. The account, in detail, of these disbursements, is headed, "Captain Grimwood and Owners of Hersey to William Orr, for amount of said brig's disbursements at Hobart Town;" and in it I find, apparently, as paid for the [\*411] "master's private account, "August 26th, Captain Grimwood, 10*l.*; September 12th, 20*l.*; October 6th, 30*l.*; October 17th, 20*l.*;" all the items together, exclusive of 33*l.* 13*s.* 8*d.* for commissions, amounting to 222*l.* 12*s.* 3*d.* It might have been supposed that, on a settlement of these accounts, and a payment of the balance to the master, all the charges and claims of Mr. Orr had been satisfied, and that the ship might have sailed; but, instead of that, I find a further account, amounting to 451*l.* 11*s.* 11*d.*, and among the items are — "William M. Orr, sundries, 83*l.* 2*s.* 10*d.*," a sum due to Mr. Orr; then, further on, there is, "Sutherland, G. and R., sundries, 46*l.* 2*s.* 10*d.*; Gaylor, P., biscuit, 34*l.* 13*s.* 6*d.*; Sutherland, G. and R.," again, "sundries, 16*l.* 6*s.* 6*d.*; Ditto, ditto, 84*l.* 10*s.* 1*d.*" These are extraordinary accounts, and they are without any vouchers or bills of parcels.

But supposing these accounts refer to supplies and necessities pro-

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The Hersey. 3 Hagg.

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vided for the ship, in what way does it appear that they were furnished on the credit of the ship? I find no trace of any intention, nor any necessity to raise money on the hypothecation of the ship; nothing of the kind. The vessel was a stout vessel; it had met with no damage; it required no repairs; it had never been in distress; and the master was in no want of funds, nor the owners of credit. The master was intrusted with selling the owner's goods, receiving the freight; and there is no advertisement for a loan or advances upon bills or otherwise; though certainly Mr. Hewitt speaks to some unsuccessful applications of that kind. However, there is \*no advertisement; and it is not till after three months, [ \*412 ] during which time the master was in full communication with Orr, the agent, that a long account of debts due from the ship is produced, and a bottomry bond taken. Were, then, such debts so incurred as to constitute a lien on the ship, and to give the master a right to hypothecate her? If the funds were advanced by Mr. Orr before the bottomry bond was contemplated, they were advanced by him on the credit of the owners or master. If they were advanced on the guaranty of Orr, the debts were simple contract debts, not entitled to priority of payment, nor authorizing the hypothecation of the ship. Looking further into this transaction, it appears to be a mere contrivance to obtain an advantageous mode of remittance to London without risk, and with a premium of twenty per cent. In the first place, who is Mr. Orr? He is the agent, charging his whole commission, and making advances on the credit of the master and owners. Who is Mr. Hewitt? A shipper of goods, who has goods on board this ship. And these are the very persons to whom a bond was given by this master on *The Princess Royal*. That bond was given jointly; here Mr. Orr is kept out of sight, and the name of Mr. Hewitt alone appears; but a letter, inclosing this bond, is written to the agents in London, and directing them, on the receipt of the money, to pay over 200*l.* to the credit of Mr. Orr, of Hobart Town. It is said that, in the former transaction, the bond was paid; but if I understand the fact, it was paid by a mortgagee of the ship; and it was not his interest \*to resist the payment of the [ \*413 ] bond, there being a surplus for that purpose after the discharge of the mortgage.

On the whole of this case, I have no doubt that the transaction is correctly stated by Mr. Gosson, in his affidavit. Mr. Gosson was a surgeon, and a passenger on board; and he states that, on the 3d November, Orr threatened to arrest the master, and prevent the ship from sailing, unless he gave a bottomry bond, and that it was by compulsion, and under this threat of arrest, that the master executed



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The Perth. 3 Hagg.

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this bond. But a compulsion of that sort will not make a bottomry bond valid; and indeed, if this transaction were upheld, it would, as Lord Stowell observed in *The Augusta*,<sup>1</sup> “go the length of turning every case into a case of hypothecation.” I am, then, of opinion that there was no necessity for this bond, and I therefore dismiss the application to enforce payment of it; and as I think the vessel has been improperly arrested, and that the owners have been put to considerable inconvenience and expense in examining this bond, I am further of opinion that they are entitled to their costs.

From this sentence there was an appeal, by reason “that the bond was proved to have been given for necessary disbursements on account of the ship, in a port where the owners had no personal credit; and that there was no proof whatever of the fraud and other misconduct imputed to the obligee of the bond, in order to impeach [ \* 414 ] its validity,” but after counsel had been \* heard for the appellants, the sentence was affirmed, with costs.<sup>2</sup>

*Sir Frederick Pollock and Addams*, for the appellants.

*Sir W. W. Follett and Nicholl*, *contra*.

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### PERTH, Spink.

January 12, 1838.

Collision. Principles applicable to steam-vessels. *Held*, that a steamer — which, going in a fog with unabated speed, in a track frequented by coasters, did not, when hailed, order her engines to be stopped, and a collision ensued — was liable to the amount of damage and costs.<sup>3</sup>

THIS was a suit, by the sole owner of *The Ariel*, a collier, of South Shields, for damage to the amount of 127*l*., by *The Perth*, a Dundee steamer.

*Burnaby and Haggard*, for *The Ariel*.

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<sup>1</sup> 1 Dod. 283.

<sup>2</sup> [3 Moore, P. C. R. 79.]

<sup>3</sup> [The *Londonderry*, 4 Notes of Cases, Supp. xxxi; The *Europa*, 2 Law & Eq. R. 557.]

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The Perth. 3 Hagg.

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*Phillimore and Addams*, for the steamer.

SIR J. NICHOLL. The *Ariel*, a brig of 215 tons and nine men, with a cargo, alleges "that she was struck and damaged, about seven P. M. on the 4th of January, while standing out from the shore, at nearly high water, (off Sizewell Bank,) on the starboard tack, and all hands on deck, the wind being W. N. W.,—adverse to the collier,—the night dark, and the weather hazy; that upon hearing the noise of paddles to windward, she was put about to stand for the shore on the larboard tack, and a lighted candle held on the weather side of the quarter-deck; that as soon as the steamer was descried, the crew of the brig shouted, "Keep your helm hard a-port;" that there was no answer, the engines were not stopped, nor was her \*speed diminished, nor course altered; and that the [ \*415 ] steamer struck the brig violently, and then pursued her course; that the brig, the weather being favorable, got into Harwich." The rejoinder added, "that the collision was from the steamer not keeping more to the eastward, the place of collision being directly in the track of coasters between Yarmouth and Orfordness, and that many vessels were drawing up towards the land, to anchor during the ebb."

On the part of the steamer it was alleged, "she was of 399 tons, had two engines of 150 horse power, thirty-two men, and two strong lights; that the large bell was rung about half-past six, and thence every half minute; that a good look-out was ordered, and the helmsman to be careful; that the master and mate were on deck, and that as soon as the mate heard voices, and saw the topgallant sails, he called out, Port the helm and go astern; but that before the order could be given to stop the engines, both vessels had come in contact, and that they soon separated, each going opposite courses." The Perth denied "that she was asked to stay by The *Ariel*, or was blamable."

Such is an outline of the statements on either side, and there are affidavits pretty much to the same effect.

Respecting steamers generally, they are a new species of vessel, and call forth new rules and considerations: they are of vast power, liable to inflict great injury,—and particularly dangerous to coasters,—if not most carefully managed; yet they may, at the same time, with due vigilance, easily avoid doing damage, for they are much \*under command, both by altering the helm, [ \*416 ] and by stopping the engines; they usually belong to great and opulent companies, and are fitted out at great cost, and on these considerations, when they afford assistance, they obtain a large re-

muneration. The owners of sailing vessels have, I think, a right to expect that steamers will take every possible precaution.

Such are the principles necessary to be observed in administering justice, in cases of this description, in the Court of Admiralty; and it is desirable that they should be known.

It is admitted that the weather was hazy and foggy, and Barney, a passenger in the steamer, proves that they did not see the brig until her topgallant sails were visible; they then were close upon her, but did not see the hull; the fog, therefore, was dense and low, lying on the water, so that even the strong light on the bow would be useless, and even that on the funnel head would hardly be sufficiently visible. The steamer, too, was going through the fog at the rate of twelve miles an hour, in a course where coasters are numerous, and yet she did not abate her speed, nor did she keep further out from the shore, and more to the eastward—which she could easily have done. Again, it is admitted by the steamer that she heard shouting, and that an order was given to port the helm—a very proper precaution at that time—(and without which the brig might have been struck amidships); but was that all that could have been done? Some time elapsed—the master went forward, and yet no orders were given to stop the engines; and I cannot understand why [\*417] they were not directed to \*be stopped; it would have been a common precaution. My opinion is, that vessels of this class are bound to use the utmost care.

The court then addressed Captain Stanley Clarke and Captain Weller, two of the Elder Brethren of the Trinity House:—

Having now stated the principles which the court is disposed to uphold, and that it is incumbent upon the steamer to show that there was no mismanagement, no blame imputable to her, your opinion is requested, whether, in this case, the steamer is answerable for the damage, or whether she is completely exonerated, as having done all in her power to avoid the collision?

The senior Trinity Master replied:—We are of opinion that, considering the fog and other circumstances, the steamer ought to have reduced her speed one half; such a precaution was due to the safety of the upward bound vessels; as soon also as the shouting was heard, the engines should have been stopped: by our own experience, we know that a steamer can be stopped in nearly her own length; the force of the blow would at least have been much weakened.

The court condemned The Perth in the damages and costs.

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The Rapid. 3 Hagg.

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\* LAGAN, otherwise MIMAX.

[\*418]

January 12, 1838.

Possession of a ship, time having been allowed for an appearance by the purchaser, decreed, *in penam* to former owners, upon affidavits that the ship, having been abandoned by the master was sold without their concurrence or consent.

In September, 1837, this ship was arrested, in a cause of possession,<sup>1</sup> at the instance of Steen & Co., of Belfast, and upon an affidavit of one of the partners, that she had been sold at Archangel without the consent or concurrence of the owners; and subsequently upon another affidavit, it appeared that in September, 1836, the ship got upon a sand at the mouth of the river, close to the port of Archangel, there abandoned by the master, and sold by auction under the directions of Lloyd's agent, and bought for 45*l*. (though stated to have been worth 250*l*.) by a partner of Steen & Co.'s agents; and that the purchaser had changed her name.

A certificate of registry of ownership in Steen & Co. was exhibited, and on the 4th default being granted, *Addams*, on the 17th November, moved for a decree of possession; but the court directed the application to stand over, in order that the purchaser at Archangel, who had been communicated with on the arrest of the vessel, might have further time to appear.

On this day, there being no such appearance, the motion was renewed and granted.<sup>2</sup>

\* RAPID, Cochrane.

[\*419]

February 8, 1838.

Ships of war assisting British merchantmen are entitled to salvage for important services; but *aliter* if slight, and not promptly demanded.<sup>3</sup> A claim — made after a delay of eight months — not *in rem*, but by monition against owners and consignees, dismissed.<sup>4</sup>

On the 21st of January, 1837, a monition was applied for against the owner of *The Rapid*, and the owners and consignees of the

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<sup>1</sup> See *The John*, 2 Hagg. Adm. R. 305.

<sup>2</sup> See 3 & 4 Vict. c. 65, s. 4.

<sup>3</sup> [For cases as to salvage by king's ships, see *The Mary Ann*, 1 Hagg. Ad. R. 158.]

<sup>4</sup> [*The Samuel*, 4 Law & Eq. Rep. 581; *The Clifton*, 3 Hagg. R. 117.]

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The Rapid. 3 Hagg.

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cargo, to appear and show cause in a salvage suit.<sup>1</sup> The application was made upon an affidavit, from the agent of Captain Rowley and the officers and crew of H. M. S. Sapphire, with this certificate:—

“I hereby certify that the brig Rapid, of Teignmouth, whereof I am the master, bound to London, with a cargo of cotton, silk, &c., grounded on Long Island, in the Gulf of Smyrna, on the evening of the 3d of May instant; on the 4th, at six, P. M., made the signal of distress to H. M. S. Sapphire, who anchored immediately, and through her assistance was hove off the following morning, and anchored in safety.

“(Signed) Geo. A. Cochrane.”

This certificate was addressed, “To Mr. Warren, of Teignmouth, owner, and all others whom it may concern;” and was dated on board The Rapid, at anchor, 5th May, 1836.

PER CURIAM. The services do not appear of great merit, and a considerable time has elapsed since they were rendered; it is a pity the matter has not been settled. The affidavit does not verify the certificate; when it is amended in that respect I will allow the motion to issue.

On the 18th of April, the warrant having been executed on the owner and thirteen consignees, was returned: and an appearance being given for \*the parties monished, the case came on upon petition and affidavits. The value of the property saved was put at 12,000*l*. No bail was given.

*Queen's Advocate* and *Phillimore*, for H. M. S. Sapphire, in accounting for the lapse of time since the service, stated that at first Captain Rowley was not aware that the Sapphire was entitled to salvage; but that he had since directed these proceedings, in order not to sacrifice the interests of his officers and men.

*Burnaby* and *Addams*, for the parties cited.

SIR J. NICHOLL. On the morning of the 4th of May, 1836, The Rapid was on shore in the Gulf of Smyrna, with a signal of distress: H. M. S. Sapphire, not on any special service, went to her assistance, and came to an anchor, as near as she could for her own safety. Captain Rowley sent his first lieutenant to inquire the cause of the signal,

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<sup>1</sup> See *The Meg Merrilies*, *supra*, 346.

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The Rapid. 3 Hagg.

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when Captain Cochrane, the master, stated that he had got on shore by missing stays, — therefore, as lightly and easily, I apprehend, as could be, — that he had applied all his ship's force to get her off, but it was of no avail, and he should be glad of assistance. Upon this report, Captain Rowley sent boats with a stream cable and two hawsers; and the crews of the boats, and also The Rapid's own crew, applied, that evening, all their force to heave her off, but without success; they gave over at midnight, and on the next morning, at five, they again set to work; they hove upon the cables, and parts of the cargo were landed to lighten the vessel abaft; and at length, while preparing to make a further effort, the tide sud- [\*421] denly carried her off, at nine, A. M., and she anchored in safety. The master then signed a certificate of the service he had received; but the certificate was not required nor given with a view to salvage. At ten, A. M., The Sapphire hove up anchor and pursued her destination.

This transaction, then, is completed on the 5th of May, 1836, and no proceedings are commenced here until the 21st of January, 1837; and it is said that Captain Rowley erroneously considered that it was his duty to render salvage services to British merchantmen without remuneration;<sup>1</sup> but if naval officers are in ignorance of, or mistake their own legal rights, and for eight months, as here, delay to assert them, it is their own fault, and the consequences must fall upon themselves; however, if Captain Rowley had applied in due time it would have been, by his own showing, a very slight case for remuneration.

To entitle H. M. ships to a salvage remuneration for services to a private ship, the services must be important, and even then the remuneration would be less than to a merchant ship; and the same principle applies in war salvage; — and for many reasons: they lose no time; and they run no risk of property — both are at the expense of the public. In this case, also, there was no special assistance; no bad weather; no personal danger; no peculiar skill; no great labor. The Rapid had taken steps to lighten herself, and there is no help either in reshipping or in guarding the cargo; some acknowledgment might be due to Captain Rowley and the [\*422] officers, and something to distribute among those of the men who had particularly exerted themselves; but I cannot easily describe a case of less salvage merit in a ship in the public service: the claim therefore, even if it had been made *recenti facto*, would hardly have been sustainable.

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<sup>1</sup> See *Thetis*, *supra*, 14, *Lustre*, 155; *Ewell Grove*, 209.

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The Hope. 3 Hagg.

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The letter of Captain Rowley to the agents, authorizing this claim, has not been produced to the court; and certainly, if a real claim had been intended, the ship should have been arrested; but instead of that, the agents try to negotiate a remuneration, and failing, these proceedings are commenced—and how? Not *in rem*—the real foundation of this jurisdiction, though there may be some cases of special circumstances where salvors have been allowed to proceed by monition; but generally the ship and freight are alone liable, and where they can be proceeded against, I am not disposed to regard salvors as having a right to follow cargo, as prize goods may be followed to abide the final adjudication.

In this case there is not sufficient proof that the cargo itself was rescued from peril; yet after the consignees have parted with the property—no doubt, at least, with the greater part—and may have remitted the proceeds, and upon that which may remain on hand they may have made advances, monitions at considerable expense are served upon them and upon the owner of the ship, which in the interval of time may have passed into other hands or have been mortgaged. If Captain Rowley had been left to his own honorable mind, he probably would not have instituted this suit, and I dismiss it.

[ \* 423 ]

\* HOPE, Norman.

February 17, 1838.

Salvage of cargo and crew, by transshipment (on board a valuable Indiaman) from an American ship in a sinking state, about three hundred miles eastward of the Cape of Good Hope. Property saved 7,000*l*. Salvage, 2,000*l*. Apportionment among owners, officers, passengers, and crew.

THIS was a proceeding against an American vessel for salvage. On the 17th November, an action was entered by the late steward and eighteen of the crew of The Duke of Roxburgh, and the usual warrant of arrest extracted; on the 18th, a similar action having been entered on behalf of the master, owners, officers, passengers, and crew, and a warrant extracted, these actions were consolidated; and upon an appearance for the master of The Hope, and the owners of the goods saved, alleged to be of the value of 6,997*l*., besides goods sold at St. Helena for \$573; bail was given in 4,000*l*., and a tender made of 1,500*l*. The original action was entered, as a compromise, it was stated, was arranging to the prejudice of those who entered it.

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The Hope. 3 Hagg.

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The facts were as follows:—The D. of Roxburgh, 417 tons and twenty-four men, on a voyage from Madras to London, with cargo, valued at upwards of 20,000*L.*, saw at 11 A. M. of 29th July, about twenty-five miles off Algoa Bay, The Hope, of Philadelphia, from Canton to New York, with signal of distress; that upon four men of The D. of R. being put on board, they found she had a valuable cargo of tea and silk, a crew of seventeen, exhausted, and a passenger, and four and a half feet water in the hold; that they assisted, and on the next day, the leak gaining, the two captains agreed to transship the silks, and such other cargo and stores as could be effected; and in the afternoon it came on to blow, so that The Hope, having thirteen and a half feet water, was necessarily \* abandoned. [ \* 424 ] The D. of R., with the master, crew, and passenger of The Hope, and such goods as had been transshipped, reached St. Helena on 28th August, where part of the goods were sold to meet disbursements from the increased victualling and other expenses; she arrived in London on 31st October.

*Queen's Advocate, Phillimore, Addams, and Haggard*, for the different claimants.

*Burnaby and Jenner* for The Hope.

SIR J. NICHOLL—[Stated the proceedings and the facts.] The case is rather under singular and unusual circumstances, and perhaps calling for the jealousy of the court. What excites that jealousy, are, first, the transshipments; they may lead to deception on the owners and underwriters. Secondly, the statement of the American master, that, on 29th July, he was preparing to run into Algoa Bay, and that the master of The D. of R. declined to assist him in that respect. Now it certainly is to be vigilantly watched how far a ship, giving assistance in distress, adopts the best measures; and if The Hope could have been conducted into Algoa Bay without risk to The D. of R., it would detract much from the amount of remuneration. But considering that this statement did not find its way into the earlier history, (there being no mention of it either in the correspondence at St. Helena, or in Norman's first affidavit,) and that The D. of R. had a valuable cargo, there is not sufficient evidence to satisfy the court that there was any refusal on the part of The D. of R. to do what was most proper. I must then take the case \* as one [ \* 425 ] in which every thing was properly done; and the service is certainly very meritorious.

Bearing, then, in mind, that The D. of R. was so fully laden, that



in order to receive the transshipments, she was obliged to throw some things overboard; the inconvenience from the accession of numbers; the time and labor in the removal of cargo; its preservation; the detention at St. Helena; and, finally, the preservation of life; I think 1,500*l.* is too little in reference to the merit of the transaction, and the rate of remuneration in former cases; and I give 2,000*l.* and costs.

On 2d March, the parties not agreeing as to the apportionment, two statements were submitted to the court for its award.

SIR J. NICHOLL. It is difficult for the court, in apportioning salvage, to satisfy the owners, and the seamen, and also itself. In this instance, the owners had no personal merit, and if they take 850*l.* it is ample. To the 300*l.* proposed for the representatives of the captain, I add 50*l.*; and I give 100*l.* to the first, and 50*l.* to the second mate; they each had additional responsibility. Of the 650*l.* that remain, I am of opinion that the passengers are entitled to share as able-bodied seamen; they were delayed and experienced some inconvenience.<sup>1</sup> The crew will take in proportion to their wages; they had some extra labor, but only for a few hours; there are also three apprentices, and they will take shares equal with the seamen at the lowest rate.

[ \* 426 ]

\* PIRATICAL PROAHS.

March 2, 1838.

Upon the destruction of piratical gun-boats, bounties, in respect of their crews, decreed.

THE *Queen's Advocate*, in moving for a decree under 6 Geo. IV. c. 49, upon the destruction of some piratical gun-boats, in order that the respective bounties of 20*l.* for each man on board who was killed, and 5*l.* for each of the remainder, might be obtained, said, that in two cases, (they were those of Sir John Pechell and Hon. Capt. Abbott,) bounties had been held to be due even when the actions where on land.

The motion was supported by affidavit and documents annexed.

SIR J. NICHOLL, observing that there was very active and gallant

<sup>1</sup> See *The Salacia*, 2 Hagg. Adm. R. 269.

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The *Isabella*. 3 Hagg.

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conduct on the part of Captain Vassall and the officers and crew of *The Harrier*, granted the motion.<sup>1</sup> The decree was as follows:—

The court pronounced two armed piratical proahs, and three sampans to have been, at the time of their destruction, manned and navigated by pirates, or persons engaged in acts of piracy; to have been attacked and destroyed at the island of Soogie, by *H. M. sloop Harrier*, Sir Spencer L. H. Vassall, commander; and that there were alive and on board one hundred men, of whom four were killed, and ninety-six effected their escape.

There was a similar decree as to one hundred men on board other piratical vessels, also destroyed by *The Harrier* at the island of Arroa, of whom thirty-five were killed, and the rest escaped.

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\* *ISABELLA*, MONRO.

[ \* 427 ]

March 2, 1838.

A vessel, suddenly dismasted, was, while at anchor, and with jury-masts, taken in tow by a valuable steamer, (engaged on purpose,) for nine hours; upon the facts, the *Trinity Masters* being of opinion that, nautically, the service was towing, without risk on either side, the court upon a value of 21,000*l.* awarded 600*l.* and costs.

THIS East Indiaman, of 600 tons, going down channel, was completely dismasted, on the night of the 28th of November, by a sudden squall; she had four anchors and 412 fathoms of chain-cable, and she anchored in mid-channel, off Dungeness; on the next day, the weather was fine, jury-masts were rigged, and about noon, a collier took the second mate, and landed him at Dover to engage a steamer; the passengers remained on board. After some negotiation, *The Dutchess of Kent* steamer, of 140 horse power, was engaged at Ramsgate, (from whence she was to have gone to London with passengers,) and she reached the ship about nine A. M. of the 30th, (the wind being S. W. and S. W. by W.) took her in tow, brought her to an anchor in the Queen's Channel at five, P. M., and remained by her that night.

The value of the ship and cargo was 21,000*l.*; the value of the steamer, 12,000; the action was in 3,000*l.*; the tender 400*l.*

The question being, whether *The Isabella*, under jury rigging,

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<sup>1</sup> See, as to a distribution of bounties upon a capture of pirates, 2 Hagg. Adm. R. 407.

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The Columbia. 3 Hagg.

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would, unless with the assistance of a steamer, have probably got into safety without considerable risk of being driven on the Goodwin Sands, or into the North Sea, the court was attended by Captain Welbank and Captain Nelson, Trinity Masters.<sup>1</sup>

*Phillimore*, and *Addams*, for the salvors.

*Queen's Advocate* and *Haggard*, *contra*.

[\*428] \*SIR J. NICHOLL. In taking the opinion of the Trinity Masters upon the above point, after stating the facts and principles of law, observed to them, that to estimate a salvage service, all the circumstances must be taken into consideration in a combined view; and that if towage led to the rescue of a vessel from danger, it should be remunerated as salvage; or if an engagement even were made in port to go out and to tow, yet that unforeseen circumstances might convert such towage into a salvage service.<sup>2</sup>

The Trinity Masters were of opinion that, as seamen, the service was merely towage; that there was no risk, no straining of engines, the wind being fair during the whole time, and the vessel jury rigged; yet that the services of the steamer, though not essential to the safety of *The Isabella*, should be handsomely rewarded.

Award of 600*l.* and costs.

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#### COLUMBIA, Thornton.

April 26, 1838.

A Dutch ship going to the assistance of a British merchantman almost in a sinking state, and whose crew refused any longer to stay by her, receives on board the master, officers, passengers, and crew, and valuable treasure, and brings them to England, held entitled to salvage as for a derelict.

A moiety of the treasure decreed and apportioned.

THIS was a case of salvage for bullion transshipped, in *The Atlantic*, from a British merchantman, and, together with the captain, officers, crew, and passengers of the same vessel, brought to England by *The Phenomene*, a Dutch brig.

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<sup>1</sup> See *The Salacia*, in *notis*, 2 Hagg. Adm. R. 270. *City of Edinburgh*, Id. 333. See *London Merchant*, *supra*, 398.

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The Columbia. 3 Hagg.

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*Queen's Advocate* and *Phillimore* for the salvors.

*Burnaby, Addams, Haggard, and Robinson*, for the several consignees of cargo.

\* SIR J. NICHOLL. This is a case of high merit; the only [\*429] question is as to the amount of remuneration for the facts are not controverted; it is desirable to state them succinctly. The *Phenome*, a Dutch ship, of 500 tons and 26 men, was on her voyage with a cargo from Batavia to Rotterdam; and on the morning of the 28th of January, in lat. 42° 53' N., long. 24° 25' W., she saw a ship with a flag of distress, and reached her about 5, P. M. This was *The Columbia*, of 500 tons, with a cargo from Bombay to London; her rudder had been unshipped on the 21st, and the efforts of the crew to substitute a temporary one had failed; the vessel was thus ungovernable, rolling excessively, and with the sea occasionally breaking over her, so that she was expected to founder; and the crew, by working at the pumps, and by other fatigue and exposure, had become exhausted and reduced, eight being sick; and altogether the ship was in so hopeless a state, that on *The Phenome* coming up she was requested to remain by her during the night; and on the following morning the crew of *The Columbia* informed the master, in a very respectful manner, that they could no longer stay by the vessel; and Captain Hoed took the master of the *Columbia*, with his officers, passengers and crew, on board *The Phenome*, together with some provisions, stores, and bullion; and on the 13th of February, they arrived in her at Plymouth.

The case is one of very considerable humanity, and, indeed, has every ingredient to support a liberal reward. The *Phenome* had herself \*received some damage; she is a [\*430] foreign vessel, and had not therefore an obligation towards fellow-subjects to render this assistance; and I must remember that, upon the 27th, signals of distress had been made to another sail, and no attention paid to them. The circumstances then justify my regarding this ship as derelict: she had been from necessity abandoned: both ship and cargo were lost to the underwriters: the property saved is about 10,000*l.*; and I direct it to be divided in moieties between the owners of the property and the salvors, the costs and necessary expenses being first deducted.<sup>1</sup>

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<sup>1</sup> Nov. 10, 1837. The *Helene*, Breckwoldt, was a schooner found capsized, and a derelict, (with only the starboard quarter above water,) near the Owers, by the smack *Philippa*, on the 11th of June, and after towing her with much difficulty for several hours,

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The Richmond. 3 Hagg.

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[ \* 431 ] The court is asked to apportion the salvage ; \* and not being aware that any rule prevails in Holland, that should induce me to vary the simple one adopted in this country in the case of *The Waterloo*, (2 Dod. 443,) I shall here follow that precedent, and allot half the salvage to the owners, one fourth to Captain Hoed ; and one fourth to the officers and men, in proportion to their wages, as specified in the muster roll.

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RICHMOND, West.

June 16, 1838.

The responsibility of ship-owners, in an action for damage by collision, is limited, by 53 Geo. III. c. 159, to the value of the wrong-doing vessel, and to the freight due or to grow due for the then voyage ; nor is such responsibility extended by having given bail, unconditionally, in a sum *plus* the real value, to answer the action.<sup>1</sup>

THIS was a question under 53 Geo. III. c. 159, as to the responsibility of ship-owners, who, in a suit for collision, had appeared to the action and given bail in 2,500*l.* "to answer the action,"<sup>2</sup> being the sum in which the action was entered. The ship was not arrested. The original suit was brought by the owner of *The Boreas*, and her

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received some assistance from 2 luggers of 18 tons each, and on the 12th got into Little Hampton. Lieut. Roberts, R. N., of the coast guard, with two boats and ten men, rendered very effective aid. The owners appeared ; the agreed value was 1,600*l.* ; and the court decreed a moiety ; giving four sixteenths to *The Philippa*, two sixteenths to the luggers, and two sixteenths to the coast guard ; and of those parts half to Lieut. Roberts.

In *The Flora*, of Barth, found a derelict on the 21st of June, in the chops of the Channel by a Prussian vessel, taken in tow, assisted by H. M. S. *Cracker*, and carried into Portsmouth with risk and considerable labor, the court, upon an appearance for the owner, and on a value of 1,800*l.*, decreed all expenses to be deducted, and then a moiety between the salvors.

In *The Twee Gebroeders, Zeven*, a derelict, where the total proceeds were 102*l.* 12*s.* a moiety, deducting costs and expenses, was decreed to the master, owners, and crew of a smack.

<sup>1</sup> [*The Mellona*, 3 W. Rob. 16.]

<sup>2</sup> In a bail bond, in an action for collision, the sureties submit themselves to the jurisdiction, and bind themselves, their heirs, &c., in the sum of —, to answer the action, to abide the hearing of the cause, and likewise to pay what shall be adjudged, with expenses.

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The Richmond. 3 Hagg.

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late master and crew, for their private property on board at the time she was run down and sunk. The Richmond was a brig of 158 tons, bound to Trieste; The Boreas, a brig of 216 tons, with a cargo of granite coming from Guernsey; each claimed to be close-hauled, and that the other had a free wind. The court, assisted by Captain Timbrell and Captain Weynton, pronounced for the damage and costs.

\* An act on petition, (supported by affidavits,) now in sub- [ \* 432 ] stance alleged, on behalf of The Richmond, " that the value of the brig Richmond, her tackle, apparel, furniture, stores, and appurtenances, with the freight due for the voyage which was in prosecution at the time of the happening of the loss or damage, does not exceed 900*l*., and that the owners and the bail given are not subject or liable to answer for or make good the loss or damage sustained by The Boreas, further than the value of the said brig, and the freight due for the voyage which was in prosecution at the time of the happening of such damage; and the proctor of The Richmond therefore prayed leave to pay into court the said sum of 900*l*., and that the amount of the value of the said brig, her appurtenances and freight may be ascertained, and the amount thereof paid or distributed ratably amongst the several persons claiming recompense, according to the rules of equity; and on such distribution being made, that the owners and the bail might be dismissed from all further observance of justice in this cause."

The 900*l*. were, by the permission of the court, paid into the registry. The Boreas claimed 2,073*l*.

For the Boreas it was submitted, "that the owners of The Richmond and the bail were liable to make good the damage to the extent of such bail given by law and the custom of this court, without any reference to the pretended less value of The Richmond, her tackle, &c., now alleged to be worth little more than one third of the sum in which bail was given, in virtue whereof the brig was released."

*Queen's Advocate*, for The Richmond. By giving bail, [ \* 433 ] the owner neither admitted that he was in fault; nor, if found to be in fault, that he was liable to the extent of the bail: the bail was given in the same amount as the action was entered, and with a view to avoid the arrest and detention of the ship, either during the whole suit, or while a preliminary question of value was decided. The 53 Geo. III. c. 159, limits the responsibility of ship-

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The Martha. 3 Hagg.

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owners, and governs this question. *Dobree v. Schroeder*, 6 Sim. 291; *Wilson v. Dickson*, 2 Barn. & Ald. 2.

*Addams, contra.* The *Boreas* is entitled to the amount of the bail. The only point now to be ascertained is the amount of the loss. When bail was given, there was no protest; no suggestion that the value of the ship and freight, due or to grow due for and during the then voyage, was not equal to 2,500*l.* If the real value had been ascertained, then by the letter and the spirit of the statute, the responsibility would be limited by the extent of the bail. Here the bail is unconditional, and it is conclusive of the value of *The Richmond* as against the owners. If the value is to be questioned, how can it be but upon a *constat* of value at the time of the damage—not after the wear and tear of a voyage? He cited *The Dundee*, 2 Hagg. Adm. R. 137.

SIR J. NICHOLL. The object of the statute is to limit the responsibility of ship-owners; it carries out the intention of the legislature as shown by former statutes; and is so express that the court [ \*434 ] has not power to adjudge more to be due than the \* value of the ship and freight; when that value has been ascertained I must abide by it. If exorbitant bail may have been given, that will not affect the responsibility. There is no claim made by the owners of the cargo on board *The Boreas*; but the master and mariners have a demand for nautical instruments, and for their clothes and other things.

The court allowed the petition; and referred to the registrar to ascertain the value of the ship, appurtenances, and freight. The registrar reported that value at 1,336*l.* 10*s.*, and the damage at 2,151*l.* 6*s.*: he also brought in a distributable schedule; and, on the 16th of June, the court confirmed the report.

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MARTHA, Viner.

July 4, 1838.

Where a vessel postponed her homeward voyage in search of freight, went out of port to a wreck about 500 miles distant, and there, with great risk and exertion for several days, saved valuable property, and was afterwards compelled by weather to put back to the

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The Martha. 3 Hagg.

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same port, there sold the property, and transmitted the proceeds here to abide salvage, the court awarded and apportioned a moiety among the owners, the master, mate, and crew. To entitle owners of a salvage vessel to a primary lien upon the property as a compensation for losses, such losses must be actual; but if merely speculative and consequential, they are only ingredients in estimating the remuneration, of which they receive an allotment.

THIS was a case of salvage by the master, owners, and crew of The Blakely, against the proceeds of goods and stores saved out of The Martha, a wreck on Triton Island, in lat. 15° 47' N., long. 111° 11' E.

*Queen's Advocate* and *Addams*, for the salvors.

*Haggard, contra.*

SIR J. NICHOLL. The Martha, on a voyage from Liverpool to Canton, with a very valuable cargo, was wrecked in the China Sea, about 500 miles S. S. W. of Macao, on the reef of Triton Island, only a few feet above the level of the sea—surrounded \*perpendicularly by coral rocks, and by very forcible cur- [\*435] rents; it is therefore hardly possible to imagine a situation in which a vessel could be more exposed to total loss. The master and crew got to Macao on the 15th of September; they there found The Blakely, a vessel of 314 tons and twenty in crew, delivering her cargo, and destined to Manilla for a freight to Europe. Captain Snipe, the master of The Blakely, at the suggestion of the agent, undertook to make an attempt to save part of the cargo, and with much exertion he got ready and sailed on the next day, and on the 21st reached the island. The Blakely herself there incurred great risk. Her mate and part of the crew were put on board the wreck, and communications by boats were kept up with it till the 26th; and it is not easy to imagine a case of more danger and exertion than is described. On the 26th, the weather made further perseverance hopeless, and it was prudent for The Blakely to quit; she then attempted to proceed to Manilla, but was prevented by bad weather, and she put back to Macao on the 11th of October. The goods saved were there sold by public auction; and the net proceeds, amounting to 2,731*l.* 8*s.*, have been paid into the registry, to abide the award of this court. It is scarcely possible to have a more meritorious case; the property was saved, not merely from probable risk, but absolute loss; and the master, the mate, and the crew of The Blakely have the merit of saving it. I am not aware that in any case, except that of The Jonge Bastaan,<sup>1</sup> under its peculiar circum-

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<sup>1</sup> 5 Rob. 322.



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The Martha. 3 Hagg.

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[ \*436 ] stances, a larger proportion than a moiety has \* been given where the owners have appeared ; certainly in this case I am not disposed to award less ; and I decree a moiety.

An application has been made to the court to apportion the salvage. The owners of The Blakely claim compensation for losses, which they estimate at 1,340*l.*, in consequence of this service ; and they ask that this compensation should in the first instance be deducted out of the property ; but they have not incurred any actual loss, except of an anchor and part of a chain cable ; and they paid a small sum for extra insurance ; but these items together make only about 100*l.* ; the other losses are merely speculative, as for insurance risk, loss of time, hire of the ship, diminution in value of freight, such as what are generally termed consequential losses ; at all events they are not actual losses, but are usually ingredients taken into consideration, among the other circumstances, in an award of salvage, and in which the owners participate. In effecting this salvage, the owners had no personal merit, and I must also remember that if such a compensation is to be deducted, one half of the proceeds will be taken from the actual salvors. I do not think that there is sufficient ground for the claim ; but I give to the owners half the moiety ; to the captain a quarter ; and to the mate, who was on the wreck, and had the responsibility of superintending the removal of the cargo, I give 50*l.* as an extra remuneration. The remaining 250*l.* will be divided among the crew, including the mate, in proportion to their wages.

## APPENDIX A.

3 & 4 VICT. CAP. 65.

AN ACT *to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England.* 7th August, 1840.

WHEREAS the jurisdiction of the High Court of Admiralty of England may be in certain respects advantageously extended, and the practice thereof improved: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall be lawful for the dean of the Arches for the time being to be assistant to and to exercise all the power, authority, and jurisdiction, and to have all the privileges and protections of the judge of the said High Court of Admiralty, with respect to all suits and proceedings in the said court, and that all such suits and proceedings, and all things relating thereto, brought or taking place before the dean of the Arches, whether the judge of the said High Court of Admiralty be or be not at the same time sitting or transacting the business of the same court, and also during any vacancy of the office of judge of the said court, shall be of the same force and effect in all respects as if the same had been brought or had taken place before the judge himself; and all such suits and proceedings shall be entered and registered as having been brought and as having taken place before the dean of the Arches sitting for the judge of the High Court of Admiralty.

II. And be it declared and enacted, that all persons who now are or at any time hereafter may be entitled to practise as advocates in the Court of Arches, are and shall be entitled to practise as advocates in the said High Court of Admiralty; and that all persons who now are or hereafter may be entitled to act as surrogates or proctors in the Court of Arches, shall be entitled respectively to practise and act, or \* to be admitted to practise and act, [ \* 438 ] as the case may be, as surrogates and proctors in the said High Court of Admiralty, according to the rules and practice now prevailing and observed, or hereafter to be made in and by the said High Court of Admiralty, touching the admission and practising of advocates, surrogates, and proctors in the said court respectively.

III. And be it enacted, that after the passing of this act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court, in either such case the said court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively.

IV. And be it enacted, that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court after the passing of this act.

V. And be it enacted, that whenever any award shall have been made by any justices of the peace, or by any person nominated by them, or within the jurisdiction of the Cinque Ports by any commissioners, respecting the amount of salvage to be paid, or respecting any claims and demands for services or compensation, which such justices and commissioners within their several jurisdictions are empowered to decide under the provisions of two acts passed in the second year of the reign of King George the Fourth, for remedying certain defects relative to the adjustment of salvage, or whenever any sum shall have been voluntarily paid on any such account of salvage, services, or compensation, it shall be lawful for any person interested in the distribution of the amount awarded or paid, to require distribution to be forthwith

[ \* 439 ] made thereof, and the person or persons by whom \* such amount shall be awarded, or in the case of voluntary payment the person by whom the same shall have been received, shall forthwith proceed to the distribution thereof among the several persons entitled thereunto, to be certified in the case of an award under the hand of the person or persons by whom such amount shall be awarded, and an account of every such distribution shall be annexed to the award; and if any person interested in the distribution shall think himself aggrieved on account of its not being made according to the award, or otherwise, it shall be lawful for him, within fourteen days after the making of the award, or payment of the money, but not afterwards, to take out a monition from the said High Court of Admiralty, requiring any person being in possession of any part of the amount awarded or voluntarily paid to bring in the same, to abide the judgment of the court concerning the distribution thereof; and in the case of an award, the person or persons by whom the award shall have been made shall, upon monition, send without delay to the said High Court of Admiralty a copy of the proceedings before him and them, and of the award, on unstamped paper, certified under his or their hand; and the same shall be admitted by the court as evidence, and the amount awarded or voluntarily paid shall be distributed according to the judgment of the court.

VI. And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, for services rendered to or damage received by any ship or sea-going vessel,

or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished, in respect of which such claim is made.

VII. And be it enacted, that in any suit depending in the said High Court of Admiralty, the court (if it shall think fit) may summon before it, and examine or cause to be examined witnesses by word of mouth, and either \* before or after examination by deposition, or before a com- [ \* 440 ] missioner, as hereinafter mentioned; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the said court shall direct.

VIII. And be it enacted, that the said court may, if it shall think fit, in any such suit, issue one or more special commissions to some person, being an advocate of the said High Court of Admiralty of not less than seven years' standing, or a barrister-at-law of not less than seven years' standing, to take evidence by word of mouth, upon oath, which every such commissioner is hereby empowered to administer, at such time or times, place or places, and as to such fact or facts, and in such manner, order, and course, and under such limitations and restrictions, and to transmit the same to the registry of the said court, in such form and manner as in and by the commission shall be directed; and that such commissioner shall be attended, and the witnesses shall be examined, cross-examined, and re-examined by the parties, their counsel, proctors, or agents, if such parties, or either of them, shall think fit so to do; and such commission shall, if need be, make a special report to the court touching such examination, and the conduct or absence of any witness or other person thereon or relating thereto; and the said High Court of Admiralty is hereby authorized to institute such proceedings, and make such order or orders, upon such report, as justice may require, and as may be instituted or made in any case of contempt of the said court.

IX. And be it enacted, that it shall be lawful, in any suit depending in the said Court of Admiralty, for the judge of the said court, or for any such commissioner appointed in pursuance of this act, to require the attendance of any witnesses, and the production of any deeds, evidences, books, or writings, by writ, to be issued by such judge or commissioner in such and the same form, or as nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by her Majesty's Court of Queen's Bench at Westminster; and that every person disobeying any such writ so to be issued by the said judge or commissioner shall be \* con- [ \* 441 ] sidered as in contempt of the said High Court of Admiralty, and may be punished for such contempt in the said court.

X. And be it enacted, that all the provisions of an act passed in the fourth year of the reign of his late majesty, intituled, <sup>1</sup> "An Act for the further

Amendment of the Law, and better Administration of Justice," with respect to the admissibility of the evidence of witnesses interested on account of the verdict or judgment, shall extend to the admissibility of evidence in any suit pending in the said Court of Admiralty, and the entry directed by the said act to be made on the record of judgment, shall be made upon the document containing the final sentence of the said court, and shall have the like effect as the entry on such record.

XI. And be it enacted, that in any contested suit depending in the said Court of Admiralty, the said court shall have power, if it shall think fit so to do, to direct a trial by jury of any issue or issues on any question or questions of fact arising in any such suit, and that the substance and form of such issue or issues shall be specified by the judge of the said court at the time of directing the same; and if the parties differ in drawing such issue or issues, it shall be referred to the judge of the said court to settle the same; and such trial shall be had before some judge of her-Majesty's superior courts of common law at Westminster, at the sittings at Nisi Prius in London or Middlesex, or before some judge of assize at Nisi Prius, as to the said court shall seem fit.

XII. And be it enacted, that the costs of such issues, or of such commission as aforesaid, as the judge of the said High Court of Admiralty shall under this act direct, shall be paid by such party or parties, person or persons, and be taxed by the registrar of the said High Court of Admiralty, in such manner as the said judge shall direct, and that payment of such costs shall be enforced in the same manner as costs between party and party may be enforced in other proceedings in the said court.

XIII. And be it enacted, that the said Court of Admiralty, upon application to be made within three calendar months after the trial of any such [ \* 442 ] issue by any party \* concerned, may grant and direct one or more new trials of any such issue, and may order such new trial to take place in the manner hereinbefore directed with regard to the first trial of such issue, and may by order of the same court direct such costs to be paid as to the said court shall seem fit upon any application for a new trial, or upon any new trial, or second or other new trial, and may direct by whom and to whom and at what times and in what manner such costs shall be paid.

XIV. And be it enacted, that the granting or refusing to grant an issue, or a new trial of any such issue, may be matter of appeal to her Majesty in council.

XV. And be it enacted, that at the trial of any issue directed by the said High Court of Admiralty, either party shall have all the like powers, rights, and remedies with respect to bills of exceptions as parties impleaded before justices may have, by virtue of the statute made in that behalf in the thirteenth year of the reign of King Edward the First, with respect to exceptions alleged by them before such justices, or by any other statute made in the like behalf; and every such bill of exceptions, sealed with the seal of the judge or judges to whom such exceptions shall have been made, shall be annexed to the record of the trial of the said issue.

XVI. And be it enacted, that the record of the said issue, and of the

verdict therein, shall be transmitted by the associate or other proper officer to the registrar of the said Court of Admiralty; and the verdict of the jury upon any such issue (unless the same shall be set aside) shall be conclusive upon the said court, and upon all such persons; and in all further proceedings in the cause in which such fact is found, the said court shall assume such fact to be as found by the jury.

XVII. And be it enacted, that every person who, if this act had not been passed, might have appealed and made suit to her Majesty in council, against any proceeding, decree, or sentence of the said High Court of Admiralty, under or by virtue of an act passed in the third year of the reign of his late Majesty, intituled,<sup>1</sup> "An Act for transferring the Powers of the High Court of Delegates, both in ecclesiastical and maritime causes, to his \* Majesty [ \* 443 ] in Council," may in like manner appeal and make suits to her Majesty in council, against the proceedings, decrees, and sentences of the said court, in all suits instituted and proceedings had in the same by virtue of the provisions of this act, and that all the provisions of the said last-mentioned act shall apply to all appeals and suits against the proceedings, decrees, and sentences of the said court in suits instituted and proceedings had by virtue of the provisions of this act; and such appeals and suits shall be proceeded in the manner and form provided by an act passed in the fourth year of the reign of his late majesty, intituled, "An Act for the better administration of justice in his Majesty's Privy Council;" and all the provisions of the said last-mentioned act relating to appeals and suits from the High Court of Admiralty shall be applied to appeals and suits from the said court in suits instituted and proceedings had by virtue of the provisions of this act: Provided always, that in any such appeal the notes of evidence taken as hereinbefore provided by or under the direction of the judge of the said High Court of Admiralty shall be certified by the said judge to her Majesty in council, and shall be admitted to prove the oral evidence given in the said Court of Admiralty, and that no evidence shall be admitted on such appeal to contradict the notes of evidence so taken and certified as aforesaid; but this proviso shall not enure to prevent the judicial committee of the privy council from directing witnesses to be examined and reexamined upon such facts as to the committee shall seem fit, in the manner directed by the last recited act.

XVIII. And be it enacted, that it shall be lawful for the judge of the said High Court of Admiralty from time to time to make such rules, orders, and regulations respecting the practice and modes of proceeding of the said court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, and from time to time to repeal or alter such rules, orders, or regulations: Provided always, that no such rules, orders, or regulations shall be of any force or effect until the same shall have been approved by her Majesty in council.

\* XIX. And be it declared and enacted, that no action shall lie [ \* 444 ] against the judge of the said High Court of Admiralty for error in judgment, and that the said judge shall be entitled to and have all privileges

and protections in the exercise of his jurisdiction as judge of the said court, which by law appertain to the judges of her Majesty's superior courts of common law, in the exercise of their several jurisdictions.

XX. And be it enacted, that the keeper for the time being of every common gaol or prison shall be bound to receive and take into his custody all persons who shall be committed thereunto by the said Court of Admiralty, or who shall be committed thereunto by any coroner appointed by the judge of the said Court of Admiralty, upon any inquest taken within or upon the high seas adjacent to the county or other jurisdiction to which such gaol or prison belongs; and every keeper of any gaol or prison who shall refuse to receive into his custody any person so committed, or wilfully or carelessly suffer such person to escape and go at large without lawful warrant, shall be liable to the like penalties and consequences as if such person had been committed to his custody by any other lawful authority.

XXI. And be it enacted, that it shall be lawful for the judge of the said High Court of Admiralty to order the discharge of any person who shall be in custody for contempt of the said court, for any cause other than for non-payment of money, on such conditions as to the judge shall seem just: Provided always, that the order for such discharge shall not be deemed to have purged the original contempt in case the conditions on which such order shall be made be not fulfilled.

XXII. And be it enacted, that the said High Court of Admiralty shall have jurisdiction to decide all matters and questions concerning booty of war, or the distribution thereof, which it shall please her Majesty, her heirs, and successors, by the the advice of her and their privy council, to refer to the judgment of the said court; and in all matters so referred, the court shall proceed as in cases of prize of war, and the judgment of the court therein shall be binding upon all parties concerned.

[ \* 445 ] \* XXIII. Provided always, and be it enacted, that nothing herein contained shall be deemed to preclude any of her Majesty's courts of law or equity now having jurisdiction over the several subject-matters and causes of action hereinbefore mentioned from continuing to exercise such jurisdiction as fully as if this act had not been passed.

XXIV. And be it enacted, that this act may be repealed or amended by any act to be passed in this session of parliament.

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## APPENDIX B. (p. 339.)

*At the Court at Carlton House, the 30th of April, 1813; present, his Royal Highness the Prince Regent in Council.*

WHEREAS it has been represented to his Royal Highness the Prince Regent, that on the recapture of ships and goods belonging to his Majesty's subjects,

whereof the owners and proprietors are entitled to the restitution on salvage as by law established, losses have been occasioned by the sale of ships and cargoes, on the unlivery thereof by the authority of the Courts of Vice-Admiralty ; for the purpose of settling the salvage due thereon, in cases wherein the owners and proprietors, or their agents especially authorized, are not present to claim, —

His Royal Highness the Prince Regent, in the name and on the behalf of his Majesty, is pleased, by and with the advice of his Majesty's privy council, to order, and it is hereby ordered, that in the cases aforesaid, on a claim being given for the ship by the master, or in his absence by the mate ; and for the cargo, by the supercargo or master, or by the mate in the absence of the master ; the court shall direct a valuation of the ship and cargo to be made by appraisement without sale or unlivery, as far as the same shall be practicable ; and on such valuation, to be approved and confirmed by the court, shall direct the ship and cargo to be restored to the person or persons aforesaid, claiming the same, on payment of the proportion decreed to be paid to \*the captors, in lieu of salvage, and of such costs and expenses as [\* 446] shall be directed by the court ; and in default of such payment, the court shall order and direct so much of the cargo to be sold as shall be sufficient for the payment of the salvage and expenses due thereon ; and further, so much of the said cargo as shall be sufficient to pay the salvage and expenses due on the ship, if the person or persons to whom the cargo shall be restored by decree of the court shall consent thereto.

And it is further ordered, that in no case shall the court proceed to order the ship or goods to be sold or unlivered, save as aforesaid, unless such sale or unlivery shall, owing to special circumstances, become necessary ; in which case the reasons on which the judge shall proceed to make such order shall be noted summarily in the minutes of court : and the right honorable the Lords Commissioners of the Admiralty, the judge of the High Court of Admiralty, and the judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectfully appertain.

JAS. BULLER.

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## APPENDIX C.

DONNA BARBARA, Luiz.

FROM the rejection of the claim upon petition, of Sir F. A. Collier, (see 2 Hagg. Adm. R. 360,) that officer appealed to the delegates, when an appearance for the lords commissioners of his Majesty's treasury was given under protest ; and the act on petition, on their behalf, after setting forth the circumstances of the capture, the claim, the memorial to the treasury for bounties, the reference to the High Court of Admiralty, and the decree in that court, further alleged, " that the said cause was brought before and deter-



mined by the said court, under and in virtue of the 5th Geo. IV. c. 113, intituled, An Act to amend and consolidate the Laws relating to the [\* 447] Abolition of the Slave Trade, whereby it is enacted, in \*the 71st clause thereof, as follows:” That any party or parties claiming any benefit by way of bounty or share of the proceeds, for the seizure of any Spanish, Portuguese, or Netherlands vessels, for violation of treaty or convention, shall and may resort to the High Court of Admiralty, for the purpose of obtaining the judgment of the said court in that behalf; and that it shall and may be lawful for the judge of the said High Court of Admiralty to determine thereon, and also to hear and determine any question of joint capture which may arise upon any seizure of slaves, and enforce any decree or sentence of any of the mixed commission courts established, or to be established, in pursuance of treaties or conventions with foreign powers, and the decrees or sentences of the Vice-Admiralty Court, relating to any seizure under this act.

“And *Nicholl* humbly submitted, that this is not a cause civil or maritime, within the ordinary jurisdiction of the High Court of Admiralty; that as the act of parliament by which the power of hearing and determining such cause is given to that court, does not provide for any appeal from the sentence or decree given or pronounced in virtue of such authority, the inhibition and citation issued under seal of his Majesty’s High Court of Delegates, is null and void to all intents and purposes in the law whatsoever; and that his, the said *Nicholl*’s, parties are not bound to appear thereto: wherefore *Nicholl* prayed the judges delegate to pronounce for his protest, and to dismiss his parties from this pretended appeal, and from all further observance of justice therein.”

In the presence of *Pulley*, dissenting and submitting “that the inhibition and citation is not null and void in law, but that the same has rightly and duly issued, even admitting it to be true, as alleged by *Nicholl*, that this, in the first instance, was not a cause civil and maritime, under the ordinary jurisdiction of the High Court of Admiralty, and that the act of parliament referred to, giving the said High Court of Admiralty jurisdiction in such causes, does not make any mention of the appellate jurisdiction therein of this court:” wherefore *Pulley* prayed the judges delegate to overrule the protest made [\* 448] and interposed in this cause, and to direct *Nicholl* to appear absolutely.”

The sentence of condemnation pronounced by the Mixed Commission Court at Sierra Leone was as follows:—

*British and Brazilian Court of Mixed Commission, Sierra Leone.*

Before George Jackson, Esq., H. B. M. commissary judge in the said court, and William Smith, Esq., H. B. M., commissioner of arbitration in the said court, as associated with the commissary judge aforesaid, in the absence of either of the commissioners on the part of H. I. M. the Emperor of Brazil. Present, Joseph Reffell, Esq., registrar, 13th April, 1829.

## DONNA BARBARA, Luiz, master.

Our Sovereign Lord the King against the schooner or vessel Donna Barbara, whereof Thomas Luiz was master, her tackle, apparel, and furniture, and all and singular the goods, wares, merchandise, and slaves on board the same, and therewith seized and taken by a tender of H. B. M. ship Sybille, Francis Augustus Collier, C. B., commander, and brought to Sierra Leone, and against all persons in general.

“Thomas Luiz, master of the said vessel, prayed the claim by him given to be admitted, and the said schooner, cargo, and slaves, to be restored as claimed, as the sole property of Wincelao Miguel de Almeida, of Bahia, together with costs, damages, and expenses. John Samo, proctor on behalf of the captors, prayed the said claim to be rejected, and the said schooner and cargo to be condemned, and the slaves to be emancipated. The said commissary judge and commissioner of arbitration having heard the said claim and proofs read, pronounced the said schooner Donna Barbara, her tackle, apparel, and furniture, and the goods, wares, and merchandise laden therein, to have been, at the time of the capture and seizure thereof, engaged in the illicit traffic in slaves, and as such \* subject and liable to confiscation, and condemned the said schooner, her tackle, apparel, and furniture, and the goods, wares, and merchandise laden therein, as taken in such illicit traffic by a tender of H. B. M. ship of war Sybille, Francis Augustus Collier, C. B., commander; and moreover pronounced the said slaves, natives of Africa, to be emancipated from slavery, and to be employed as servants or free laborers; and also that it had been proved, that at the time of passing the said sentence, 86 men, 129 women, 76 boys, and 60 girls, children under fourteen years of age, did compose the whole of the slaves so decreed to be emancipated from slavery; and that it had been further proved, that at the time of the said capture 357 slaves were seized and found on board of the said schooner Donna Barbara, and that six of the said slaves had died between the time of the capture and of the condemnation of the said schooner.”

This protest was argued before Mr. Justice Park, Mr. Justice Littledale, Mr. Baron Vaughan, Dr. Burnaby, Dr. Daubeny, Dr. Lushington, Dr. Haggard, and Dr. Curteis.

*King's Advocate and Dodson*, for the protest.

*Addams, Nicholl*, and *Mr. Butt*, *contra*.

The protest was overruled; and on the 9th January, 1834, after argument by the same counsel, it being held that, independently of the merits, the sentence of the Mixed Commission Court was conclusive as to the legality of the capture, the decree appealed from was reversed.

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REPORTS  
OF  
CASES  
ARGUED AND DETERMINED  
IN THE  
HIGH COURT OF ADMIRALTY,  
COMMENCING WITH  
THE JUDGMENTS  
OF THE  
RIGHT HON. STEPHEN LUSHINGTON.

BY WILLIAM ROBINSON, D. C. L., ADVOCATE.

*"Ea verè præstabilis est scientia quæ in fœderibus pactionibus conditionibus populorum regum  
externarumque nationum in omni denique belli jure et pacis versatur."* — CICERO.

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

VOLUME I.

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TO

THE RIGHT HONORABLE

THOMAS, EARL OF HADDINGTON,

BARON OF BINNING AND MELROS,

FIRST LORD COMMISSIONER OF THE ADMIRALTY,

ETC., ETC., ETC.,

THESE REPORTS

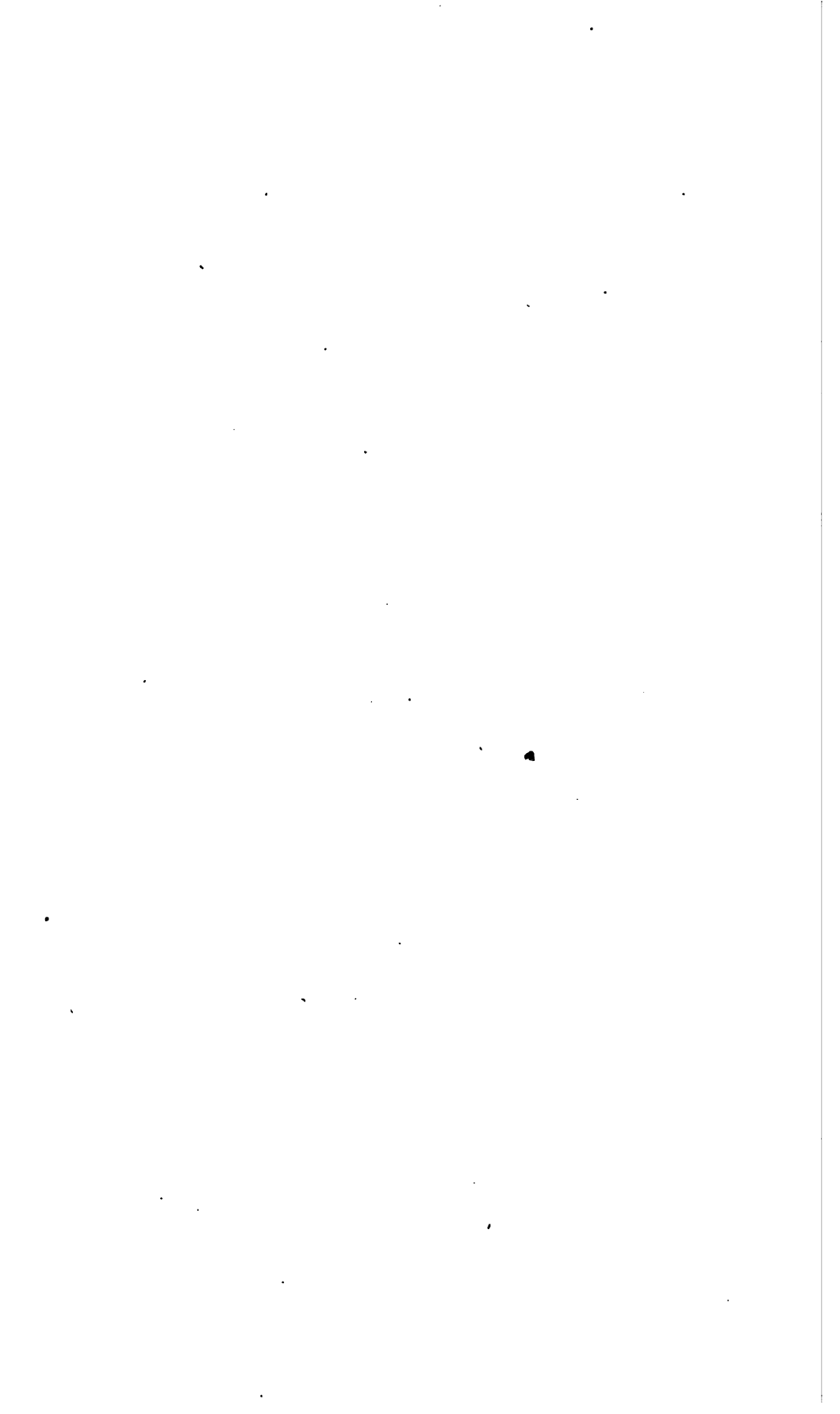
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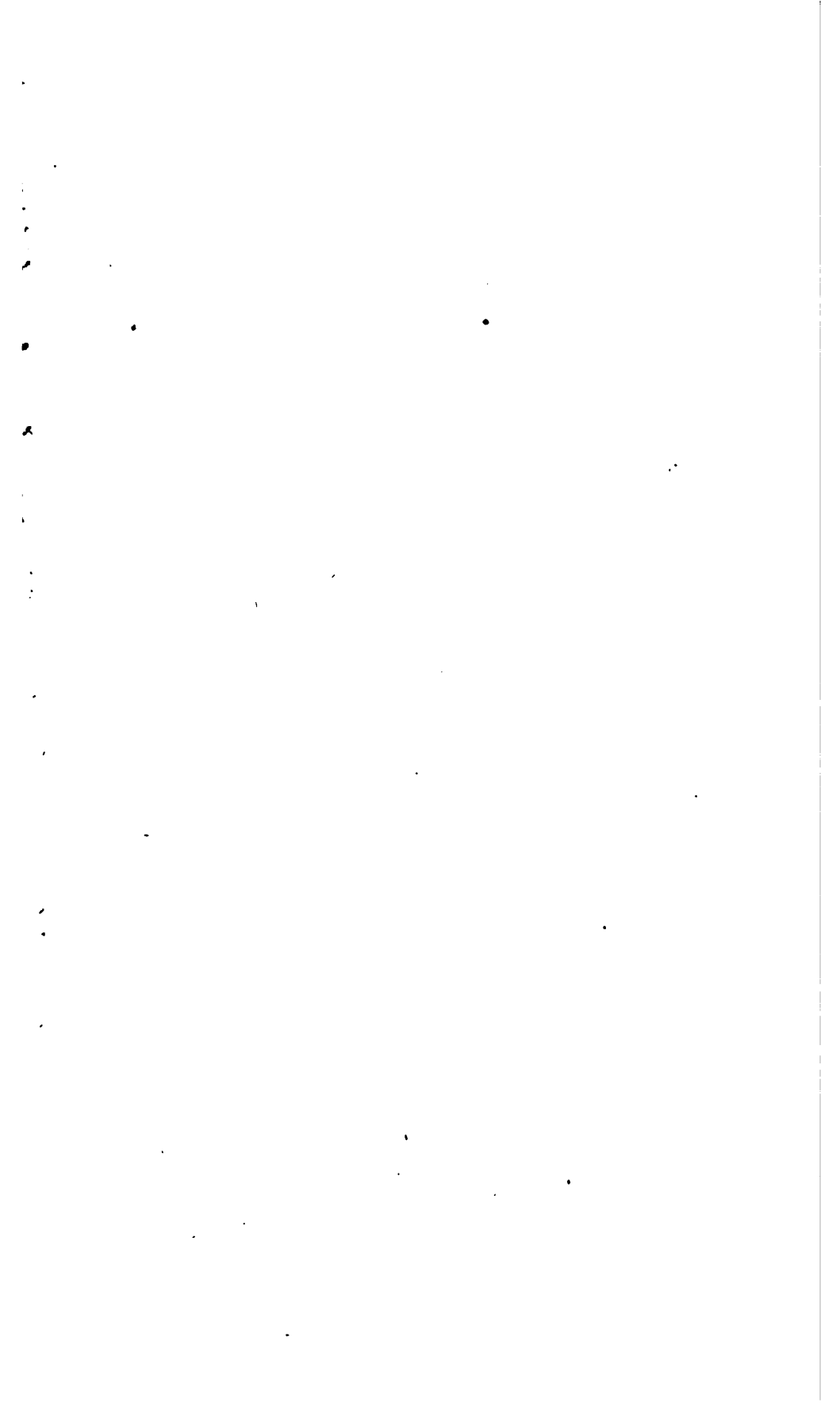
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WILLIAM ROBINSON.





J U D G E ]  
OF THE  
HIGH COURT OF ADMIRALTY,  
During the Period comprised in this Volume,  
THE RIGHT HONORABLE STEPHEN LUSHINGTON.  
QUEEN'S ADVOCATE,  
SIR JOHN DODSON.  
ADVOCATE OF THE ADMIRALTY,  
JOSEPH PHILLIMORE, D. C. L.



## ADVERTISEMENT.

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IN continuing the series of the Admiralty Reports commenced by his father, the late Sir Christopher Robinson, the editor has endeavored to confine himself as much as possible to those cases in which some principle of law is involved, or some point of practice has been laid down in the decision of the court.

With respect to a large class of cases which, in the time of peace, form the subjects of litigation in the Instance Court of Admiralty, namely, claims of salvage and causes of damage by collision, it is well known that, in the great majority of instances, the questions raised are strictly questions of fact, and the decisions of the court necessarily turn upon the particular circumstances of each individual case. Important as such cases may be to the parties immediately concerned in them, it is obvious that the publication of their details could prove neither interesting nor profitable to the professional reader. The insertion of these cases, therefore, except in particular instances, has been studiously avoided by the reporter.

As regards the cases which form the present selection, care and attention have been bestowed in the execution of the undertaking, to state with accuracy the facts of each case upon which the judgment of the court has been delivered. And the reporter takes this opportunity of expressing his obligation to those members of the profession who have rendered him their assistance, and more especially to the learned judge of the court, under whose sanction this volume of reports is now presented to the public.

DOCTORS' COMMONS, December, 1843.



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# REPORTS OF CASES

DETERMINED IN THE

## HIGH COURT OF ADMIRALTY.

---

VIBILIA, Richardson.

December 5, 1838.

A bottomry bond, granted by the master of a British vessel to a merchant of Philadelphia, who had consented to act as mercantile agent for the ship and cargo during the progress of repairs in the port of Philadelphia, upheld.

The fact of a lien on the ship existing by the law of the country in which the bond is given, is an important ingredient, and furnishes a presumption in favor of bottomry, and against personal credit.<sup>1</sup>

Small advances, originally made without any express stipulation for a bond, but followed by a bond of bottomry, may be included in the bond.<sup>2</sup>

It is not incumbent upon a foreign merchant advancing money upon bottomry for the repairs of a vessel to calculate the expediency of such repairs.<sup>3</sup>

THIS was the case of a British ship bound from Belize, in the bay of Honduras, with a cargo of mahogany, for the port of London.

In the course of her homeward voyage, the vessel being much damaged by stress of weather, was compelled to put into Philadelphia, and the master, upon his arrival, having placed himself under the direction of the British consul and the agent for Lloyd's at that port, was introduced by them to Mr. Baldwin, a merchant of Philadelphia, who consented to act as mercantile agent for the ship and cargo during the progress of the necessary repairs.

The master being wholly unprovided with funds or credit, endeavors were made in the first instance, but without success, to meet the expenses of the repairs by raising money upon bottomry.

A sale of the cargo was then resorted to, and during the repairs,

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<sup>1</sup> [The *Lochiel*, 2 W. Rob. 45; The *Osmanli*, 3 W. Rob. 198; The *Augusta*, 1 Dod. 283.]

<sup>2</sup> [The *Trident*, 1 W. Rob. 34.]

<sup>3</sup> [See note to The *Jane*, 1 Dod. 461.]

the whole of the cargo was sold at three distinct sales, the proceeds being received by Mr. Baldwin, and disbursed by him in the [ \* 2 ] service \* of the ship, with the sanction and concurrence of Captain Richardson, the master.

Previous to the last sale of the cargo, it became evident that the whole of the proceeds would not be sufficient to meet the costs of the completion of the repairs and the outfit of the ship. Upon this, attempts were again made to raise money upon bottomry, by application to several merchants of Philadelphia. Failing in these attempts, the master then applied to Mr. Baldwin to take upon himself the responsibility of the expenses beyond the proceeds which might arise for the further sale of the cargo, the master undertaking to give a bottomry bond for the balance. Upon the faith of this promise, the repairs were completed by Mr. Baldwin, and the vessel was furnished with supplies for her homeward voyage; and upon the 13th of January, 1838, a bond was executed by the master in favor of Mr. Baldwin, to the amount of \$3,060, with maritime interest at the rate of fifteen per cent.

The vessel sailed from Philadelphia on the 16th of January, 1838, and arrived at the port of London on the 27th of February following, when, payment of the bond being resisted by the owners, the proceedings in the cause were instituted by the bondholder, on whose behalf,

*Haggard and Robinson*, submitted —

That the owners' admissions in the cause established a clear case of unprovided necessity for the foundation of a bottomry transaction, and the bond in question embraced upon the face of it every essential requisite of a bond of bottomry. That the conduct of Mr. Baldwin had been fair and honorable throughout the whole of [ \* 3 ] the proceedings, \* and was supported by a strong balance of testimony in his favor, whilst the case set up on the other side rested solely upon the unsupported evidence of Captain Richardson, the master, whose present depositions were at variance with his own conduct at the time. Lastly, that it was important for the security and promotion of the commercial interests, that bonds of this description should be supported; that they had ever been regarded as of a high and sacred character, and there was nothing in the circumstances of the present case to detract from the favor with which such instruments had heretofore been regarded by the court in the cases of *The Rhadamanthe*,<sup>1</sup> and *The Alexander*.<sup>2</sup>

<sup>1</sup> 1 Dod. 203.

<sup>2</sup> 1 Dod. 278.

---

The *Vibilia*. 1 W. Rob.

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For the ship-owners, *Queen's Advocate* and *Addams*, *contra*, contended —

That the master had been superseded in his authority, and imposed upon in the present transaction; that the repairs were inexpedient under the circumstances of the case, and the owners' interests had been improperly compromised, inasmuch as the expenses of the repairs amounted to the sum of 4,000*l.*, and the value of the ship on her arrival in England was only 2,300*l.*; that neither the master himself, nor any person acting on his behalf, had power to sell the whole cargo, as had been done in this case.<sup>1</sup>

Lastly, that, by the law of America, Mr. Baldwin, the bondholder, had a lien upon the ship, which he had thought fit to relinquish.

\* That some of the items in the bond were for advances [ \* 4 ] made before the bond was contemplated; and the bond in itself was an attempt to convert a transaction of personal credit into a bond of bottomry, which could not be supported under the authority of the principles laid down by Lord Stowell in the case of *The Augusta*.<sup>2</sup>

#### JUDGMENT.

DR. LUSHINGTON. The question arises upon the validity of a bottomry bond, dated 13th January, 1838, and executed by the master at Philadelphia, in which port the vessel had taken refuge in consequence of having sustained severe injuries at sea. The ship belonged to the port of London, and was proceeding on a homeward voyage from Honduras when she suffered the damage which compelled her to put into Philadelphia. The bond is duly executed, and, *prima facie*, all is regular, but its validity has been impugned upon grounds of law and also of fact, which I must presently examine. Before, however, entering upon the discussion of circumstances peculiar to this case, it may not be unadvisable to consider what is meant by that *dictum* so often cited, and again urged in this cause, that bottomry bonds are of a high and sacred character.<sup>3</sup> All legal engagements, all contracts sanctioned by the law, are sacred; that is, they are to be enforced by every court of law and equity; the expression, therefore, so often repeated, must, I think, have some other meaning more appropriate and peculiar to the subject itself, than merely

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<sup>1</sup> *Allen v. Sugrue*, 8 Barn. & Cr. 561; *Cambridge v. Anderton*, 2 Barn. & Cr. 691; *Gratitudine*, 3 Rob. 241.

<sup>2</sup> 1 Dod. 283.

<sup>3</sup> [The *Mary Ann*, 4 Notes of Cases, 376.]

[ \* 5 ] to denote the character which \* a bottomry bond enjoys in common with other legal instruments.

I may also further observe that this expression, so often quoted, cannot refer to priority of payment; for of that, when the bond is admitted to be valid, no doubt is ever entertained. The only meaning which, with satisfaction to my own mind, I can attach to this observation is, that where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond, in all essentials, apparently correct, then that under such circumstances the strong presumption of law is in favor of its validity, and it shall not be impugned save when there shall be clear and conclusive evidence of fraud, or where it shall be proved beyond all doubt that, though purporting in form to be a bottomry transaction, the money was in truth and in fact advanced upon different considerations.

And it appears to me that this view of the question is confirmed by the very nature of bottomry transactions. There must be in all such transactions the act of the master, the agent of the owner, evinced by the execution of the bond; and the presumption is, that he would perform his duty honorably, and not unnecessarily subject the property of his principal to heavy burdens. Again, the transaction taking place in distant countries, where it may be often difficult for the foreign merchant who advances on bottomry to furnish adequate proof as to all parts of the *res gesta*, this furnishes another reason for presumption in favor of a bond necessarily signed by the master. It is for the general advantage of the shipping

[ \* 6 ] interests of the world, that \* bottomry transactions should not be rendered too difficult; and, in ordinary transactions of this kind, there is less reason to complain, because the interest of the owner can never be affected save, as I have already observed, by the act of his own selected agent, except, indeed, in the few cases of the original master no longer having the command.

Another question has been raised in argument, of considerable importance in itself, though not, perhaps, necessarily requiring a decision in this case. I now refer to the question, how far the law of the country where the bond is given, allowing a lien on the ship, may in any way affect the validity of a bottomry bond.

A lien may exist in three ways: —

1st. The creditor having actual possession of the ship may retain it till paid, as a ship-builder having the ship in his own dock. This lien to retain exists in England.

2dly. A lien for the benefit of all material men to take possession

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*The Vibilia.* 1 W. Rob.

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till their debt be paid. This is not the law of England, but is unquestionably the law of many foreign countries.

The third case is where a person has lent money to be employed in repairing or fitting out a ship; then, by the ancient civil law, and, as I apprehend, by the law of very many maritime states except England, the benefit of a lien is permitted to subsist.

Now, assuming the law at Philadelphia to be the most extensively favorable to the doctrine of lien, and to give such a right to the person who advances money or becomes responsible for repairs, what effect would such circumstance have on the present case? According to the authority of Lord Stowell, that circumstance, namely, the power of arrest or \*detention alone, would not [ \* 7 ] be sufficient to convert an advance of money into a bottomry transaction. Look at the facts of the case, and mark the words of that learned judge in the case of *The Augusta*, where it had been alleged, and not denied, that the right of lien subsisted by the law of that country.<sup>1</sup> "The master had carried out a letter of credit to Messrs. Beerbohn, of Memel; on the faith of that letter of credit, moneys had been advanced, and a bill drawn; on that bill being dishonored, then, and for the first time, Messrs. Beerbohn call on the master to execute a bond for moneys already advanced on personal credit. The original transaction was on personal credit; the merchant wished to convert it (a most appropriate phrase used by Lord Stowell) into that which was not its primary character."

I agree with Lord Stowell, that the law giving a lien may not alone be sufficient for such conversion, and for this reason; if Messrs. Beerbohn had refused to advance the money on personal credit, the master had then his option to try whether he could not raise it from other sources on personal credit, and from persons ready to waive their right of lien; of this option the master could not be justly deprived.

But does it therefore follow, that in a case of totally different nature — where money has not been proved to have been lent on personal security; where there is no question of conversion; where the question is whether the advances were on personal security or not; I say, does it follow that in such a case, the fact of a lien existing by the law of the foreign state, is no ingredient, no important circumstance in ascertaining the true nature of the \*transac- [ \* 8 ] tion? I am of a contrary opinion, and so I think was Lord Stowell. When such is the state of the law, and where the question

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<sup>1</sup> Dodson's Admiralty Reports, vol. i. p. 283.

is personal credit or not; it is, in my opinion, most important to bear that law in mind, because it is a state of things rendering bottomry more probable; it furnishes a presumption in favor of bottomry and against personal credit; for why should a merchant, without some such consideration as that of bottomry, abandon the lien the law of his own country affords him, and trust to the credit of an owner in a foreign country, of whom by the very case supposed he knows nothing? Of this way of thinking, I conceive, was Lord Stowell when he pronounced his judgment in the case of *The Alexander*,<sup>1</sup> and the doctrines laid down in that case bring to my attention another point which has been suggested as possibly affecting this case. I now refer to the possibility of a part of the items having been advanced without any express stipulation for a bottomry bond. When there has been an advance clearly on personal credit, the authority of *The Augusta* would strikingly apply; but where the advances have been to some small extent without direct evidence as to original understanding or contract, but followed by a bottomry bond, what is the principle of law applicable to such a case as this? Is the court to enter into a consideration of minute items, and separate some few from the general bulk, because there is not direct evidence of a bottomry agreement with respect to them? I think not; and I conceive my opinion to be supported both upon authority, sound principle, and the convenience of all maritime states.

[ \* 9 ] Upon authority, because I never remember Lord \* Stowell to have entered into any such nice and difficult disquisitions of items; on the contrary, his opinions expressed in *The Alexander* evidently go still farther, even to the extent of saying, that the taking the bond might be postponed, at least where, as in the present case, the law of lien exists, until the ship is about to sail.

Upon sound principle, because I think, that when the general character of the transaction is clearly that of bottomry, the whole is to be presumed to be of the same character, unless expressly disproved.

Upon the convenience of maritime states, because the expenses absolutely necessary on the immediate arrival of a ship in port, as custom dues, could never be made the subject of bottomry, for the payment thereof is too urgent to allow of the discussion and inquiry incidental to a bottomry transaction. If they could not be so covered, the result might be that no advances, however small, however urgent, could be made, and great loss and ruin might accrue; and lastly,

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<sup>1</sup> 1 Dodson's Admiralty Reports, 280.

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The Vilibia. 1 W. Rob.

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because the investigation of such items would in almost all cases entail a minute inquiry generally wholly unwarranted by the amount in dispute.

Having thus stated what occurs to me on the important questions of law which have been raised in this case, I now proceed to apply them to the facts, which are few and simple, and can occupy but a short space of time in the investigation, though in so doing it may be necessary to advert to some other considerations which have been introduced into the argument.

Looking, then, to the facts of the case before the court, I may first observe, that there are two very essential particulars admitting of no doubt. The \* absence of any personal credit is [ \* 10 ] beyond all question, and the distress is not only admitted to have been extreme, but it is contended that the injuries done were so great, and the expense of the necessary repairs to enable the vessel to come home so enormous, that no repairs ought to have been done; but that the vessel should have been abandoned. Now assuming this to be the true conclusion to be drawn from evidence, namely, that it was inexpedient to repair; the first question is, can such a circumstance affect the validity of a bottomry bond? It is very true, that to enable a tradesman who repairs or supplies a ship to sue the owner, he must show that the expenses were necessary and reasonable. But the necessity and the price are not at issue here; the question is as to the expediency under the circumstances of furnishing what was necessary to enable the ship to complete her voyage. I greatly doubt whether it is the duty of a tradesman to form a judgment of such expediency, often depending on the probable value of the cargo, and many complicated considerations, but I conceive it would be wholly a new doctrine to impose such a burden on a foreign merchant who advances his money on bottomry, unless, indeed, the case is so glaring that the advances under such circumstances must necessarily be imputed to fraud.

But does the evidence in this case satisfy the court either that Mr. Baldwin has been guilty of fraudulent conduct in advancing this money, or been deficient in the exercise of that caution which the most rigorous principle of law could exact from him?

I am decidedly of a contrary opinion. He acts with the concurrence, advice, and authority of the \*very individuals [ \* 11 ] from whom is to be expected the most anxious desire to protect the property of the absent British owner, the authorized agent of Lloyd's, and the gentleman acting as consul with the approval of the British minister.

Surely it is not to be believed on slight grounds, that these gentlemen



betrayed their trust, and confederated with the American merchant to defraud the British owner.

Again, look at the terms on which the money was advanced, remembering, too, that it was so advanced at a period when money was by no means in superabundance in the United States. I find the commission on the disbursements and freight charged  $2\frac{1}{2}$  per cent. only, amounting in the whole to little more than \$250; and the maritime interest at 15 per cent. Looking at all the facts, I think I am bound, and I do without hesitation come to the conclusion that whatever else may be predicated of this transaction, it is not tainted with fraud or a corrupt desire unreasonably to profit by the distress of the vessel.

It is said, however, that the transaction has proved ruinous to the British owner, that the expediency of abandoning the vessel was clear, and that master was desirous of pursuing this course, but that the whole cargo has been improperly sold, and the owner is saddled with a demand for repairs above the value of the vessel.

That this adventure has turned out most unprofitable for the owner, there can be little doubt; but the question is whether this circumstance will invalidate the bond? If I was satisfied, from the evidence,

that the master had been compelled by Mr. Baldwin to repair [ \* 12 ] the vessel against his, the master's, remonstrance, and for Mr. Baldwin's advantage, the case would assume a very different aspect; it would then clearly approach a case of fraud. But this representation of the master rests for its sole foundation upon his own statement made now in court, wholly unsupported by any act whatsoever prior to the date of the bond, and not only unsupported, but in opposition to his own conduct. If such was the master's clear conviction at the time, what was his duty? To enter his protest — to write to his owners — to ask further advice. In the total absence of any of these measures on the part of the master, I must say, that I see no reason for concluding that he declared or avowed any such conviction, or made known to Mr. Baldwin any such objection.

The account which the master gives of the transaction in his affidavit before the court is inconsistent and improbable upon the face of it; and with respect to the imputations he advances against Mr. Jordan, the acting British consul at Philadelphia, and against Mr. Vaughan, the agent for Lloyd's, as having acted in concert to supersede him in his authority, I see no reason to think, that either Mr. Jordan or Mr. Vaughan have lent themselves to the transaction, except on a pure conviction that the course which was pursued was most for the benefit of all parties.

With regard to the further objection that has been urged in the

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The Vibilia. 1 W. Rob.

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argument, that it was not until after the responsibility had been incurred by Mr. Baldwin, that a bottomry bond was agreed upon, I am of opinion, that such objection has been disposed of by the judgment of Lord Stowell in the case of *The Alexander*.<sup>1</sup> What are the expressions used by \* Lord Stowell in that case? He [ \* 13 ] says, " The question is, whether so induced they (the consignees) did not make these advances on the credit of the ship? Against the proprietors of the cargo they had no direct demand for repairs done to the ship, and as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself as their security. Some of the advances were made before the master was appointed; and these, it is said, could have had no reference to a bond of hypothecation. But what could they look to but the ship? for of the owners of the ship they had no knowledge, the bond was not, perhaps, noticed at first; because in Pernambuco, as in other foreign states, there is no necessity for an instrument of this kind; for by the general maritime law, the vessel itself is *ipso facto* liable for repairs. There was no necessity, therefore for having recourse to a bond till the ship was coming to this country, where, from peculiar motives of policy, a special hypothecation is required." It is evident, therefore, that in the opinion of Lord Stowell, it is competent for the foreign merchant, without any express agreement for a bottomry bond, to make advances on the security of the ship, that is upon the faith of a lien given by the law of his own country; and it is not necessary for him to have a bond of bottomry, or an agreement for such bond, until the ship is about to sail. This is the real substance of the case of *The Alexander*, and constitutes the important distinction between the cases of *The Alexander* and *The Augusta*,<sup>2</sup> which applies only to the conversion of an advance on personal security into a bottomry transaction.

Applying the principles thus laid down by Lord Stowell to the present case, the question which I \* have next to consider is not whether all the advances were originally made with a view to a future bottomry bond, but whether any part of those advances were made upon personal credit. If the money was advanced on personal credit, or if Mr. Baldwin made himself responsible, looking to personal credit only, as in the case of *The Augusta*, the law of lien would not entitle him to convert that which was originally a transaction of personal credit into one of bottomry. It is a totally different matter to convert a transaction from its primary character of

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<sup>1</sup> [1 Dod. 280.]<sup>2</sup> [1 Dod. 283.]

personal credit into bottomry, and to take a bottomry bond where the money was at first advanced upon the security of a lien or right of lien on the ship.

Looking then to all the circumstances of the present case, I am clearly of opinion, that the whole *res gestæ* prove that Mr. Baldwin never intended to advance his money upon personal credit at all. Upon what possible ground should he have advanced such a large sum on the personal credit of a foreign owner, with whom he had no connection, and against whom, unless he had taken a bond of bottomry, he could have had no remedy but an action at law in England? What, on the other hand, could be more natural, and as I think, legal, than that he should have become responsible to the extent of the value of the cargo under his control, and then require a bond as his security for the remainder of the expenses to be incurred? Upon the whole facts of the case, therefore, I am perfectly satisfied as to the validity of the bond in question. If the owners have suffered severely on the present occasion, their loss has partly arisen

from the act of God, against which there is no prevention, [ \* 15 ] and partly from the \* imprudence of their own master; and here I may take occasion to observe, that the court will be very reluctant to relax the obligation of the owners' responsibility for the acts of their masters within the scope of the authority committed to them. For all errors of judgment, the owner who selects the master must be responsible; he reposes the trust at his own discretion, and within legal limits it must be at his own risk.

Without imputing to the master upon the present occasion any intentional neglect of duty, I must further observe, in conclusion, that if Captain Richardson had thought fit to stand upon his conduct in the United States, he would have appeared more fairly before the court than he has done in these proceedings, in which his representations as to what occurred in the United States are entirely repugnant to the acts done by him whilst there.

I must, therefore, pronounce for the validity of the bond, and of course, with costs.

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The *Emu*. 1 W. Rob.

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## THE EMU, Nelson.

December 19, 1838.

A tender of 200*l.* for a salvage service upheld.

In salvage cases, where a tender is held to be amply sufficient, costs will be given.<sup>1</sup>

In this case The *Emu*, of 381 tons burden, in the prosecution of her voyage from Hobart Town to London, with a valuable cargo on board, got upon the Maitland Sand, on the Essex coast, in the evening of the 15th of July.

The Sir Robert Hawkes, a steam-tug of thirty-five horse power, with a crew of eight men, was proceeding down the river at the time, in the employment of the Yarmouth Fishing Company, and seeing the situation in which The *Emu* was placed, she tendered her assistance, and her services were accepted \* by the mas- [ \* 16 ] ter of The *Emu*. A rope was fastened to the steamer, and endeavors were made to drag The *Emu* off the sand in which she was embedded, but the rope breaking and the tide falling, the attempt was abandoned for the night; and on the following morning, The *Emu* was drawn off the sand and towed up to London, by the assistance of the salvors.

The value of the ship, cargo, and freight, was estimated at 11,773*l.*, and a tender of 200*l.* was made by the owners, and rejected by the salvors.

For the owners, *Queen's Advocate* and *Gosling*.

For the salvors, *Addams* and *Blake*.

The court having adverted to the general merits of the case, pronounced the tender to be sufficient, and upon the question of costs observed:—"With regard to the question of costs, it is my determination to give no costs at all in the present instance. I wish it to be understood, however, that in future where a tender is pronounced for, and held to be amply sufficient, I shall always give costs. When the question as to the sufficiency of the tender is nicely balanced, the court will not consider itself bound to give costs, but the general principle will be in favor of costs.

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<sup>1</sup> [The *Frederick*, 1 Hagg. Adm. R. 211, note.]

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The Frederick. 1 W. Rob.

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## THE FREDERICK, Thurman.

December 19, 1838.

Pilots are not bound to go on board a damaged vessel for mere pilotage service and reward.<sup>1</sup>

THIS was a cause of salvage promoted by the master, mate, and crew of a pilot smack, The Providence, for services rendered under the following circumstances. Between one and two o'clock, [ \* 17 ] P. M., the 1st of June last, The Frederick, a foreign vessel 282 tons burden, was observed apparently in distress, about eight miles below the Winterton Ridge Sand, and at four o'clock of the same day she was boarded by the salvors, the vessel being at the time within two cables' length of the ridge, and in imminent danger of striking upon it. It appeared by the protest that she had previously struck on another sand called the Leman Sand, and at the time the salvors went on board, she had made forty-eight inches of water; the crew were in an exhausted state, the rudder damaged, and the water was gaining on them. By the assistance of the salvors she was brought into Harwich harbor on the morning of the 4th of June. For this service a tender of 100*l.* was offered and refused.

For the salvors, the *Queen's Advocate* and *Jenner*.

For the owners, *Addams* and *Robinson*.

The court allotted 50*l.* in addition to the tender, together with the costs, and in the course of its judgment observed:—"It has been urged in the argument for the owners, that pilots are not to convert their duties into salvage services. This may be a correct position under ordinary circumstances; at the same time it is to be observed, that it is a settled doctrine of this court, that no pilot is bound to go on board a vessel in distress to render pilot service for mere pilotage reward. If a pilot, being told he would receive pilotage only, refused to take charge of a vessel in that condition, he would be subjected to no censure, and if he did take charge of her he would be entitled to a salvage remuneration."

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<sup>1</sup> [For cases as to salvage claims by pilots, see *The Joseph Harvey*, 1 C. Rob. 306; *Hobart v. Drogan*, 10 Pet. 108; *Hand v. The Elvira*, Gilp. R. 60; *The General Palmer*, 2 Hagg. Adm. R. 176; *The City of Edinburgh*, Id. 333; *The Industry*, 3 Hagg. Adm. R. 203; *The Pilorgis*, Bee, 212.]

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The Thomas Wood. 1 W. Rob.

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\* THE THOMAS WOOD, Wright.

[ \* 18 ]

January 22, 1839.

In appeals from magistrates' awards, the proceedings in the Court of Admiralty may be commenced by act on petition and affidavits.

A special application to the court for the liberty of so proceeding is not required; but parties will be liable to the costs if further evidence shall be introduced without sufficient cause.

THIS was an appeal from an award of three magistrates of Great Yarmouth, allotting the sum of 400*l.* for services rendered to the brig The Thomas Wood, and an application was now made on behalf of the appellants for leave to commence the case in this court by act on petition and affidavit, instead of proceeding to a hearing in the usual form upon the minutes transmitted to the court under the act of parliament, the 1 & 2 George IV. c. 75.

The affidavit to lead the motion set forth, that, at the time of the hearing of the case before the magistrates, no evidence upon oath was taken; that the agent for the salvors merely read a statement of the alleged services drawn up by himself, and that although several contradictions to such statements were offered by the captain and his agent, these contradictions did not appear to be in any manner noticed in the minutes of the magistrates' proceedings.

The affidavit also further set forth certain discrepancies in the magistrates' notes, and an averment that the notary who had noted the master's protest had also acted as agent for the salvors; under these circumstances

*Nicholl* for the appellants submitted — That the minutes made by the magistrates did not contain such evidence of the parties and their witnesses as was contemplated by the act. That it was not on oath, nor was there any opportunity of cross examination. That the statute only made the certified copy of the magistrates' proceedings \* evidence of what had in fact taken place before [ \* 19 ] them, and did not preclude objections on the appeal to the admissibility as evidence of that which had been received as such by the magistrates. That in this case the minutes did not sufficiently set forth the services rendered to the vessel and her cargo, to enable a just and equitable decision to be founded thereon, and that the court might, and had frequently, received further evidence, and in support of the application he cited *The Venus*.

On behalf of the respondents, the motion was opposed by the

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The Thomas Wood. 1 W. Rob.

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Queen's Advocate, who contended, that the act 1 & 2 Geo. IV., under which the proceedings had been originally instituted, did not require the evidence to be taken on oath, and that it was not the practice so to do; that the court must decide the case upon the original evidence, and that the present application was inadmissible under the authority of the cases, "The Osiris," and "The General Palmer," reported in 2 Hag. 135, 323.

PER CURIAM.

Although in cases of appeal the decision of appellate courts is generally guided by the evidence produced before the original tribunal, the practice has been different in this court; and in the first case of this kind, which came before Lord Stowell, that learned judge admitted an additional affidavit to be brought in, notwithstanding the objections that were raised against its reception at the time, founded on the act of parliament that has been referred to in the present instance. The practice of the court therefore is not opposed to the admission of fresh evidence.

[ \* 20 ] \* But supposing myself not bound by any preceding case, let us look to the act in question, the words of which undoubtedly are not very clear nor precise.

The 8th section of the act provides, that "the decision of such justices shall be final and conclusive on all parties, save and except in such cases in which an appeal shall be interposed by either party to the High Court of Admiralty, within thirty days after the award." The first consideration, therefore, is, what is meant by the term appeal, which certainly is a word of equivocal meaning. In some courts it means a rehearing on the same evidence. In this and the ecclesiastical courts, though such in practice is generally the case, new matter, both in plea and evidence, may be introduced in the Court of Appeal. As, therefore, some doubt attaches to it, it is necessary to look further to other parts of the act to see if they afford any explanation.

Now the 9th section declares, "that in case the party or parties claiming to be entitled to salvage, or the party or parties who are to pay the same, shall be dissatisfied with such award of the justices, it shall be lawful for either of them respectively, within ten days of the award, to declare their desire of obtaining the judgment of the High Court of Admiralty respecting the said salvage;" not respecting "the decision of the justices," but respecting "the said salvage," which includes the whole question; and the same section goes on further to provide "that a certified copy of the proceedings shall be transmitted on unstamped paper, and the same shall be admitted by the Court of Admiralty as 'evidence in the cause,' but not as

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The Monarch. 1 W. Rob.

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the sole evidence." The 9th section, therefore, gives the \* construction of the 8th section, and shows, in my opinion, [ \* 21 ] that it is open to either party to introduce further evidence, if such shall be deemed necessary to elucidate the truth of the case; and this at the absolute discretion of such party, and without obtaining the previous sanction of this court. If such sanction were required, the court must almost necessarily enter most inconveniently into the merits of the case and into disputed facts, in order to decide the preliminary question, whether it ought or ought not to permit further evidence to be introduced.

With respect to the mode of introducing such evidence, I think an act on petition is a convenient form of proceeding, as setting forth a statement which confines the affidavits to the points intended to be brought before the court. I shall, therefore, admit the present application, at the same time directing the minutes of the original proceedings to be brought in; and I wish it to be understood, that in future, on appeals from the award of magistrates, parties may at their own discretion, and without special application to the court, bring in an act on petition and affidavits. But this step will certainly be taken at the imminent peril of costs, if such further evidence shall ultimately appear to the court to have been introduced without sufficient cause. In this view of the law, I need not at present enter into the objections taken in this case to the magistrates' proceedings.

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THE MONARCH, Bell.

January 31, 1839.

The Court of Admiralty possesses the same discretionary power of varying its decrees as is possessed by other courts of this country.<sup>1</sup>

Such variation should be confined to an alteration of an error arising from defect of knowledge or information upon a particular point in the case, and the error must be brought to the attention of the court with the utmost possible diligence.

THIS was originally a cause of collision, promoted by the owners of The Success, a fishing smack of \* Harwich, (32 [ \* 22 ] tons burden,) against the steam-vessel The Monarch, for damage sustained at sea, whereby the said smack was totally lost on the night of the 3d of October, 1837.

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<sup>1</sup> [See The Vrouw Hermina, 1 C. Rob. 163; The Elizabeth, 2 Acton, 57.]



At the hearing of the cause on the 4th session of Trinity term, 1838, the late judge of the Admiralty, Sir John Nicholl, assisted by two Trinity Masters, pronounced both parties in the cause in fault, and decreed the loss to be equally borne between them; and an interlocutory decree was taken down by the registrar in the assignation-book in the following words:—"The judge being assisted by Captains Timbrell and Hayman, two of the elder brethren of the Trinity Corporation, and having read the act and the evidence, by interlocutory decree pronounced the collision in question in this cause, to have been equally the fault of the masters and crews of the said ship *Monarch* and the said smack *Success*; and for a moiety only of the damage proceeded for, and condemned the owners of the said ship *Monarch*, Pulley's parties, and the bail given in their behalf, in a moiety of the amount of such damage; and of the costs incurred on behalf of Pitcher's parties in this cause; and the judge, at the further petition of Pitcher, referred to the registrar and merchants the amount of the damage pronounced for, together with all accounts and vouchers brought in or hereafter to be brought in relative thereto, to report thereon."

It appeared, that previous to the entry of the decree in the assignation-book, a draft thereof was submitted by the registrar to the judge in chambers, who confirmed its accuracy and approved of its contents.

[ \* 23 ] On the last court day, (2d session of Hilary \* term, 1839,) an application was made to the court on behalf of the owners of *The Monarch* to vary the decree in question as regarded the costs, on the ground that it was inequitable; and that the late judge could not have intended to burden them with three fourths of the expenses. On the contrary, that he had actually directed the parties to pay their respective costs, as was set forth in the affidavits of persons of respectability who had taken notes of the judgment at the time, and the Queen's Advocate was about to read one of these affidavits, when he was stopped by the court.

DR. LUSHINGTON. "I cannot allow the registrar's entry to be questioned, upon the averment of another person's impression as to what took place at the time, especially after the registrar's statement, that he subsequently took the opinion of the late learned judge as to the accuracy of the decree in question."

*Queen's Advocate.* "It was taken in the absence of the parties interested, or their advisers, and if the late judge had heard counsel on

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The Monarch. 1 W. Rob.

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the subject, he would never have sanctioned the decree as it now stands recorded."

DR. LUSHINGTON. It may be so, but I cannot help that; the court must uphold the statement of its registrar. With respect to the present application, I should be disposed so far to alter the decree as to meet what I conceive to be the equity of the case; but I am not aware that the court possesses the power to do so in the present instance. Can you furnish the court with any precedents to such effect?

\*The *Queen's Advocate* replied in the negative and the [ \* 24 ] application was then directed to stand over, that cases might be looked into; and on this day (the 4th session of Hilary term) the question was again brought before the court, when —

The *Queen's Advocate* and *Haggard* in support of the motion, cited the cases of *The Fortuna*, (4 Robinson, 278;) *L'Invidiato*, (Acton, 111;) *Jennet*, (Acton, 332.)

*Addams* and *Robinson*, *contra*, contended —

That the cases cited did not meet the case in point, as there was no omission to be supplied, and no ambiguity to be explained.

The decree in question was clear and perfect upon the face of it, and the present application was, in point of fact, an appeal from the judgment of the late judge. That its admission would be a departure from the ordinary practice of the court, and be attended with great inconvenience, and that a similar application had been held inadmissible by the Privy Council in the case of *The Elizabeth*.

#### JUDGMENT.

DR. LUSHINGTON. The statement of the registrar, that the decree as taken down was submitted to the late judge, and confirmed by him, relieves me from the necessity of inquiring in the present instance into what fell from Sir John Nicholl in delivering his judgment in this case. Some misunderstanding evidently prevailed at the time respecting the decree in question, as the different counsel engaged in the cause have different notes of it. But the learned judge was subsequently referred to, and he approved of the terms of the decree as taken down by the registrar. \* The 23d of June, [ \* 25 ] 1838, is the date of the hearing of the case, and some short interval elapsed before the decree was shown to the learned judge. It must, therefore, have been in the beginning of July that the decree was so submitted to him, and consequently, there was no opportunity

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The Monarch. I W. Rob.

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of bringing the matter formally to his notice during the regular sittings in term. It would, perhaps, have been desirable that the learned judge should have had information from the advocates and proctors in the case; but having heard from the registrar, that the decree was so submitted and approved of, I cannot allow any other evidence to be received to contradict it, and I shall proceed upon the assumption that this was the decree of the late judge.

The terms of the decree are as follows — [the court here read the words of the decree, and proceeded to observe,]

There is, then, no ambiguity upon the face of the decree.

Under this state of circumstances, two questions arise; —

First, whether I have the power to vary a decree? and secondly, whether this is a case in which I should exercise that power?

Now, supposing that it had been competent to the late learned judge to have altered his judgment, I am clearly of opinion, that he would not have adhered to the terms of this decree as it now stands; and for this reason, that in the case of *Hay v. Le Neve*,<sup>1</sup> which was decided in the House of Lords, in 1824, and in which case the same question arose, it was held, that as both the vessels were in [ \* 26 ] fault, the loss should be equally borne by both parties \* in the suit, and with respect to the costs, it was decreed that each party should pay their own costs.

In the case referred to, the question of costs was most maturely considered by Lord Gifford; and in delivering the judgment of the House of Lords, Lord Gifford stated, that he made the decree, that each party should pay their own costs, with the concurrence of Lord Stowell, with whom he had consulted upon the subject, and by whose assistance he had been furnished with the case of *The Judith Randolph*, decided by Sir James Marriott in 1789, where a similar principle was laid down and adopted.

In the equity of the decree thus made with respect to the costs in the case of *Hay v. Le Neve*, I most entirely concur; and I believe that if Sir John Nicholl had been aware of this case at the time he delivered his judgment, he would have acted in accordance with the decision of the House of Lords and of Sir James Marriott.

Being of this opinion, I have now to consider, whether I have authority, according to the rules and practice of this court, to vary this decree; so far, at least, as the learned judge himself would have varied it if the case of *Hay v. Le Neve* had been brought to his notice.

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<sup>1</sup> [2 Shaw's Scotch Appeal Cases, p. 395.]

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The Monarch. 1 W. Rob.

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It has been argued, that great inconvenience will ensue if the decrees of this court, after they have been once made, can be altered, varied, or rescinded. If it was a frequent practice to alter the decisions of the court, much evil and inconvenience would undoubtedly ensue in consequence. At the same time it is to be observed, that great injustice may be occasioned if this court has not such a \*discretionary power of varying its decrees as is possessed [ \* 27 ] by other courts of this country. The Court of Chancery, before enrollment of a decree, may, and often does alter, vary and amend it; and I am at a loss to conceive upon what grounds this court in its equitable jurisdiction is to be precluded from a similar discretionary authority.

In the exercise of this authority I should, I trust, use the greatest caution, and the limit which I would propose to myself in future cases is this, merely to make such an alteration of an error arising from defect of knowledge or information upon a particular point, as the justice of the case requires; at the same time, let it be understood, that it must be an error instantly noticed and brought to the attention of the court with the utmost possible diligence.

With respect to the case before the court, if I could satisfy my conscience that in varying this decree, I was departing from what would have been the real judgment of Sir John Nicholl, I would abstain from making any alteration in the terms of the minute, as it has been taken down by the registrar in the present instance. But believing that I am about to affect, not only what I have authority to do, but what the late learned judge himself would have done, if he were sitting in this chair, I think that I am bound to vary this decree to the extent of making it accord with the judgment of the House of Lords; namely, that each party should pay their own costs.

With regard to the costs which have been incurred subsequently to the decree, I shall adopt the same course. I shall not give Mr. Pulley his costs, \*because I think that Mr. Pitcher [ \* 28 ] was right in standing by the decree which was the decree of the court. It is an unfortunate case, but I cannot do otherwise.

## NEW BRUNSWICK, Magnus Bruce.

February 19, 1839.

Where the legal holders of an overdue bond of bottomry are resident abroad, and have no agent in this country, interest upon such bond will not be decreed prior to the arrival of a power of attorney authorizing the receipt of the principal.

THIS was a cause of bottomry, promoted by Messrs. Bertlesen and Haskier, of Christiana, in Norway, the legal holders of a bottomry bond upon the ship and freight for 850*l.* 9*s.* 9*d.*, payable within eight days after the ship's arrival in England.

The vessel arrived at Liverpool on the 11th of February, 1838, and upon the 20th of February, a warrant of arrest was extracted. The ship was subsequently sold under a decree of the court, and upon the 30th of October, 1838, the amount of the bond was paid out of the registry to the attorney of the bondholders, to whom a power of attorney authorizing him to receive the money, had been sent by the bondholders.

The power of attorney was dated the 23d of July, 1838, and was received on the 8th of August.

*Haggard*, for the bondholders, now moved the court to decree interest to be due upon the bond from the 19th of February, when the bond became due, to the 30th of October, when the amount was paid out of the registry.

PER CURIAM. The practice in these cases has varied, but I have no doubt what the practice ought to be. Upon principle, where a party has bound himself to pay a sum of money upon a certain [ \* 29 ] day, if he \* retains that money in his own possession after the time specified, interest is legally due. There is, however, this difficulty in the present case, that before the power of attorney arrived in England, the bondholders had no agent in this country authorized to receive the money on their behalf.

The power of attorney bears date the 23d of July, and was received upon the 8th of August following. Before that day no legal discharge could be given for the payment of the amount of the bond; I must, therefore, pronounce the interest to be due only from the 8th of August till the 30th of October.

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The Trident. 1 W. Rob.

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## THE TRIDENT, SIMSON.

February 19, 1839.

A bottomry bond, granted by the master of a British vessel in a port of this country, upheld.<sup>1</sup> The authority of the court to take cognizance of such bonds, does not depend upon the locality of the owner's residence, but upon the necessity of the case.

THIS was a question as to the validity of a bond of bottomry executed by the master of a British vessel in a port of this country, under the circumstances noticed in the judgment of the court.

For the bondholders, *Haggard*.

*Addams, contra*.

## JUDGMENT.

DR. LUSHINGTON. The question which I have to decide in this case is of very considerable importance, and has not, I believe, ever been directly determined by any previous decision of this court.

The facts of the case are shortly these:—The Trident, a British vessel, the owner residing in Scotland, sailed from Kirkaldy in North Britain, in October, 1835, bound on a voyage to the East Indies and back. At Singapore, the master took up 24*l*. on bottomry, and at the Cape of Good Hope, he also gave \*two bonds [ \* 30 ] upon the ship and freight to the amount of 1,379*l*. In November, 1837, the vessel left the Cape of Good Hope for London, and having suffered much damage in the course of her homeward voyage, was compelled by stress of weather to bear up for Plymouth, where she arrived upon the 14th of February, 1838.

Here the master wrote to his owner in Scotland, to apprise him of his arrival, and he also obtained further advances of money from Messrs. Hawker & Co., to defray the pilotage dues and other necessary disbursements. Upon the 25th of February, Mr. Black, the son-in-law and the personal representative of the owner arrived at Plymouth, and informed Messrs. Hawker & Co. that the owner had died insolvent; that he, Mr. Black, did not intend to administer to his effects, and that he would make no advances on account of the vessel; at the same time, recommending Hawker & Co. to take a bond of bottomry.

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<sup>1</sup> [See *The Jenny*, 2 W. Rob. 5.]

Under this state of circumstances, the master, it appears, applied by letter to the consignees of certain portions of the cargo who were resident in London, for an advance of money, but received no answer. He then wrote to Mr. Ripley, of Liverpool, another of the consignees, requesting permission to draw upon him for 150*l*. and proposing that the amount of the money so advanced should be deducted from his freight. Upon the 12th of March, Mr. Ripley addressed a letter to Messrs. Hawker & Co., who were his agents at Plymouth, authorizing them to advance 100*l*. upon the terms proposed by the master; and if that sum should not be sufficient to enable the master to proceed to London, \* he empowered them to make a further advance to the extent of 200*l*. upon the security of a bottomry bond.

The money was advanced, and upon the 17th of March, when the vessel was about to sail from Plymouth, the master executed a bond hypothecating the ship, cargo, and freight to Mr. Ripley, for 182*l*., with a premium of three per cent.

Such is a brief outline of this case; and the question which I have to determine relates to the validity of the last bond thus executed by the master at Plymouth. Upon the validity of the other bonds, no question is raised.

It has been objected, in the first place, against the validity of the bond, that, the owner being a British subject resident in Scotland, the transaction in question took place within the limits of the kingdom in which the owner resided. The authority of the court, therefore, to enforce the bond, is denied in the first instance, upon the circumstance of the owner's residence in Scotland.

Now, looking to the principles upon which bonds of this description are founded, I must say that, in my apprehension, the jurisdiction of this court to inquire into their validity does not depend upon the mere locality of the residence of the owner. It depends, I think, upon the absolute necessity of the case; where the master is in such a condition that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship. This, I apprehend, is the true principle upon which the master's power to mortgage the property of his owners is founded; and it is a principle consistent with public policy, [\* 32] and highly advantageous to the \* interests of British commerce. What would otherwise have been the consequence in the immediate case under consideration? The vessel arrived at Plymouth in distress. The master was without funds, and without the means of raising funds, upon personal credit, to make the necessary repairs, without which the ship could not have gone to sea. The

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The Trident. 1 W. Rob.

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owner was dead insolvent. His personal representative declined to interfere, and the consignees of the cargo refused to make sufficient advances but upon the security of a bond of bottomry. If the master had not executed the bond in question, the inevitable consequence must have been, that this vessel, with a valuable cargo on board, must have lain at Plymouth and perished.

Being, therefore, of opinion that the authority of this court to take cognizance of these bonds does not depend upon the mere locality of the owner's residence at the time the bond is given — a doctrine repudiated by Lord Stowell, in the case of *The Yzabell*,<sup>1</sup> — and that the great principle upon which such instruments are founded is the absolute necessity of the case, and the impossibility of procuring money upon other terms, I must hold that I have jurisdiction to investigate the matter at issue in the present instance; and it only remains for me to consider whether the particular circumstances of the case will justify me in pronouncing for the validity of the bond in question.

Now, a second objection that has been raised against the validity of the bond, is, that the advance of the money was originally made not upon the credit of the ship, but upon the credit of the owner, \*and this objection, if established, would at once [\*33] dispose of the case, and would undoubtedly be fatal to the validity of any bond whatever. This point has been clearly and decisively settled by Lord Stowell, in the case of *The Augusta*.<sup>2</sup> I must examine, then, how much of the money was advanced prior to the contemplation of the bond, and how much afterwards.

Mr. Luscombe, one of the partners in the house of Hawker & Co., in his affidavit, swears to the following effect:—"That, save as to the preliminary disbursements, incidental to the vessel's coming into port, the advances were not made on the credit of the master or of Mr. Black, but upon the credit of the vessel, and in contemplation of a bond of bottomry;" and he also further deposes, "that the instructions for the bond were given upon the 26th of February." Mr. Luscombe, therefore, expressly negatives the suggestion thus raised against the validity of the bond. I see no reason to distrust the evidence of this witness, and the course of the transaction, as it appears to me, was this:— Upon the arrival of the vessel at Plymouth, there were certain expenses to be immediately defrayed, such as pilotage dues, and one or two minor disbursements. These were paid by Hawker & Co., without any contemplation of a bottomry bond. The damaged condition of the ship, however, requiring fur-

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1 1 Dod. 273.

2 Ib. 283.



ther expenses, they declined to make any additional advances. A letter was then written to Mr. Ripley, and he consented to advance 100*l.* upon his portion of the freight: and if more money was required, he directed his agents, Messrs. Hawker & Co., to increase the advances to the extent of 200*l.* upon the security of a [ \*34 ] \*bottomry bond for the amount. Upon this, additional advances were made to the master, and Messrs. Hawker & Co. took a bond for the whole amount of the expenses. Under these circumstances, I am not prepared to say that the money was advanced on the credit of the owner, and not upon the security of the property. Some of the items may have been paid by money advanced before the bond was contemplated, but this circumstance will not affect its validity.

In a recent case,<sup>1</sup> I have already had occasion to consider this point; and as far as my experience goes, there have been but few instances of bottomry transactions in which some of the advances have not been made, in the first instance, without any stipulation that a bond should be given. If it were not so, the greatest possible inconvenience would arise. What would be the situation of the commerce of Great Britain, if, in every individual instance, before an advance could be made to the amount of 8*l.* or 10*l.* for expenses to be paid instanter, it should be said "No, I will not advance 1*s.* except on the promise of a bottomry bond." If this court was to disallow the advances so made to be included in the bond, great detriment, I apprehend, would be occasioned to the commerce of the country. On the other hand, in allowing these advances to be included, I do not think that I violate the spirit of the principle laid down by Lord Stowell.

It has lastly been objected, against the validity of this bond, that it was not signed by the master until after the vessel had left the Catwater and returned. . . A sufficient answer to this objection [ \*35 ] is, I \*think, to be found in the fact stated in Mr. Luscombe's affidavit, that the bond was contemplated, and instructions were given for it upon the 26th of February.

Under all the circumstances of the case, therefore, I pronounce for the validity of the bond, and in so doing I am not aware that the other bondholders can be subjected to any loss or injury by my decision. The Plymouth bond expressly hypothecates the cargo, as well as the ship and freight; it is clear, therefore, that if there should be a deficiency in the freight and proceeds of the ship to answer the seve-

<sup>1</sup> The *Vibilia*, *supra*, p. 1.

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The Johann Friederich. 1 W. Rob.

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ral bonds, that deficiency must be made up out of the cargo. I also take it to be clear, that, in a case where there are several bonds, and one is secured on the ship and freight, and another upon the ship, freight and cargo, according to every principle of equity, and this court sits as a court of equity, I am bound to marshal the assets, and say you shall satisfy your claim from the cargo, and you yours from the ship and freight.<sup>1</sup> I pronounce, therefore, for the four bonds, and the costs of all parties.

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THE JOHANN FRIEDERICH.

May 1, 1839.

A protest against the jurisdiction of the court in a cause of collision, upon the ground that both the vessels were the property of foreign owners, and the collision occurred whilst they were in the prosecution of their respective voyages upon the high seas, overruled.

Where both the parties in the suit are foreigners, the important consideration is this, whether the case be *communis juris* or not?<sup>2</sup>

All questions of collision are questions *communis juris*; but in suits for wages, the claim of the mariner must be tried by the law of the country to which the ship belongs.

THIS was a case of collision, in which the jurisdiction of the court was denied, upon the ground that both the vessels were the property of foreign owners, and the collision took place between them whilst they were in the prosecution of their respective voyages upon the high seas.

An appearance was given under protest by the owners of The Johann Friederich, and the case was argued by—

\* Addams, and Robertson, in support of the protest. [ \* 36 ]

Queen's Advocate and Haggard, *contra*.

JUDGMENT.

DR. LUSHINGTON. In this case, which came before the court upon the last court day, the question is confined to a question of law; with respect to the facts, there is no dispute.

Both vessels are admitted to be foreign vessels, and the collision is stated to have taken place on the high seas, between Dover and Dungeness.

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<sup>1</sup> [La Constancia, 2 W. Rob. 404.]  
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<sup>2</sup> [The Golubchick, 1 W. Rob. 143.]  
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In consequence of that collision, it appears that The Delos, the property of Danish owners, whilst on a voyage from Newcastle to Lisbon, was sunk and totally lost, together with her cargo and the life of one of her crew.

It also further appears that the Johann Friederich, whose owners are stated to be citizens of the free city of Bremen, after the said collision put into the port of Ramsgate, and whilst there was arrested under a warrant extracted from this court, and compelled to give bail to answer the action of the master and crew of The Delos, in the sum of 2,200*l*.

An appearance under protest is now given on behalf of the owners of The Johann Friederich, and the jurisdiction of the court is denied on the ground that the property in both vessels being the property of foreign subjects, and the accident occurring in the prosecution of their respective voyages on the high seas, the matter in question is not legally cognizable by this court. Another circumstance has also been stated in the argument, namely, that the cargo on board The Delos belonged to British subjects; but, in giving my opinion, I shall leave this entirely out of my consideration.

[ \* 37 ] \* Now no doubt could be entertained of this court's jurisdiction if the vessel that has been lost had been the property of British subjects. The question, therefore, arises whether a foreigner should be deprived of the same privilege and protection.

It is, I apprehend a general rule, that save as to real estate an alien friend is entitled to sue on the same footing as a British born subject, and if the foreigner in this case had been resident here, and the cause of action had originated *infra corpus comitatus*, no objection could have been taken.

It is said, however, that the proceedings in this court are *in rem*, a mode of proceeding peculiar to this court, and not the usual course adopted by the courts in this country in the first instance. But admitting this to be true, analogous cases exist, as in that of foreign attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail to the action; and if such a process is open to the foreigner in that case, it is difficult to understand the grounds of disputing the jurisdiction of this court in the present instance. It has also been said in the course of the argument, that this court is not desirous of exercising its jurisdiction between foreigners; and in support of this doctrine, some observations of Lord Stowell in cases of seamen's wages have been cited. But it appears to me, that the cases cited are distinguishable from the present for the following reason; that all questions of collision are questions *communis juris*, but in cases of mariners' wages, whoever

engages voluntarily to serve on board a foreign ship, necessarily undertakes to be bound by the law of the country to which such ship belongs, and the legality of his claim must be tried by \*such law. One of the most important distinctions, there- [ \* 38 ] fore, respecting cases where both parties are foreigners is, whether the case be *communis juris* or not.

In the case of *The Two Friends*,<sup>1</sup> which has been cited in the argument, Lord Stowell takes the distinction between salvage on recapture and wages, and the distinction he takes is this, that a salvage on recapture is a question *juris gentium*; so, I apprehend, is civil salvage; in which the *quantum meruit* is the only rule that exists for the guidance of the court's discretion in apportioning the remuneration. But in cases of wages, the court is called upon to take notice of the law of commerce, and the question must in most cases be decided by the municipal law of that country in which the seaman's contract is made.

With respect to the objection that has been raised against the court's jurisdiction, on the ground of the hardship and inconvenience that might be sustained if suits might be commenced at distant periods of time; the answer is that no greater inconvenience could arise than might occur where the suitors are British subjects, or where the vessel is British owned. If the owners of *The Delos* had been British subjects, it is not, I apprehend, denied that the proceedings might have been commenced at an equally distant period of time.

But again; to this inconvenience it may be proper to set off the inconvenience that would arise, if no remedy here was open to the injured parties. If these parties must wait until the vessel that has done the injury returned to its own country, their remedy might be altogether lost, for she might never return at all; and if she did return, there is no part of the \* world so distant to which [ \* 39 ] they might not be sent for their redress. In the case of a British vessel proceeded against by a foreigner, (and why a foreigner should have a preference as against British vessels I do not see,) the foreigner might be sent to Australia, the East Indies, to Newfoundland, or Canada, and in case the vessel was a foreign vessel, to any part of the globe. From these considerations it is perfectly clear, that a refusal to exercise the jurisdiction of the court in these cases, would in effect amount to a total denial of justice. It has been said, however, that a cross-action might be instituted in this case, and the result might prove *The Delos* to have been in fault, and *The Johann*

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<sup>1</sup> [1 C. Rob. 271.]

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Friederich to have sustained the injury; in which case, The Delos having been sunk, injustice would be done to the owners of The Johann Friederich, who would be deprived of any redress in this court. Such a state of facts might occur between British owners. But I cannot accede to the suggestion, that even in such case the court would be in so helpless a condition as has been represented.

With respect to foreigners suing in other courts, the judges have the power, if occasion require it, of compelling security to be given for the costs; and I see no reason, why this court should not exercise the same power. Although the jurisdiction of this court is only an instance jurisdiction, it has over and over again been held by my predecessors, that such jurisdiction is governed by equitable, as well as legal principles. If, therefore, I am asked by the owners of The Johann Friederich to act upon this principle in the present instance, I shall do so, and the course I shall pursue will be to require the owners of The Delos to give bail to answer any cross-action [ \* 40 ] \* that may be instituted, before I allow them to proceed; and the same course I should adopt, if required, between British owners. I therefore direct the protest to be overruled, and in so doing, I wish to state that the grounds upon which my judgment is founded are shortly these:—

1st. That all causes of collision are causes *communis juris*.

2dly. That the vessel at the time of her arrest was within the admiralty jurisdiction.

3dly. That the collision took place on the high seas, close upon the English coast.

If it had been necessary, I could have cited several authorities in support of the general jurisdiction of the court. But I decide the question on the grounds I have stated, without taking into my consideration the circumstance that was adverted to in argument, that the cargo on board was the property of British subjects. This fact is undoubtedly of considerable importance, inasmuch as I am at a loss to conceive how I could refuse jurisdiction, and send the British owners to a foreign country; and what an anomaly would occur, if, in a transitory action, I could do justice to one set of owners, and refuse it to another. I therefore overrule the protest, and direct an absolute appearance to be given.

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The Britain. 1 W. Rob.

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## THE BRITAIN, Allison.

June 12, 1839.

In cases of salvage, the master of the salving vessel may bind his own interest, and the interest of his employers, by an agreement with the owner of the vessel saved as to the *quantum* of salvage to be paid, but such an agreement will not be conclusive upon the rest of the crew, if made without their sanction and concurrence.<sup>1</sup>

In this case an act on petition of the salvors stated, "that at half-past 12, P. M., of the 11th of January, 1839, the smack *Fortitude*, being at sea about fifty-five miles from Lowestoff, with the wind blowing hard and a heavy sea running, descried a brig to \* windward with a signal of distress flying. That the sal- [ \* 41 ] vors immediately bore down to her, and discovered her to be *The Britain*, of 215 tons burdèn, bound from Newcastle to London, with a valuable general cargo, and navigated by the master, the mate, three seamen, and four boys. That the said brig was in a leaky and almost sinking state, having four feet water in her hold, and the water fast gaining upon her, and her crew were totally exhausted from their incessant exertions at the pumps. That the mate and four of the crew of the smack boarded the brig at the risk of their lives. That a consultation was held between the master of the brig and the master of *The Fortitude*, when it was determined, on account of the wind, to run for the *Texel*, distant about forty miles. That the mate and four of the crew remained on board the brig to work at the pumps, and the two vessels then proceeded in company for the *Texel*, a light being hung in the rigging of the brig for the guidance of the smack during the night. That a pilot came on board about two, P. M., of the 12th, and about half-past one, A. M., of the 13th, they were brought to anchor in the New Deep in the *Texel*. That but for such assistance, the brig, cargo, and crew would most probably have been lost, inasmuch as her crew could not of themselves have kept her afloat much longer, nor have brought her into port, from their exhausted state." The services in question were not denied on the part of the owners of *The Britain*, but it was set forth in their reply to the act, that upon the arrival of the vessels in *Texel*, it was agreed between the master of the brig and the master of *The Fortitude*, that the amount of the remuneration for the services in question should be settled by arbitration without appeal.

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<sup>1</sup> [The Sarah Jane, 2 W. Rob. 110, 115.]

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The Britain. 1 W. Rob.

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[ \* 42 ] \* That a declaration signed by the master and six of the crew of The Fortitude, and also a declaration signed by the master and part of the crew of The Britain, were laid before the arbitrators, who awarded that the sum of 420*l.* should be paid to the master of The Fortitude, and that he should renounce all further demand. That the expenses of the smack at the New Deep, amounting to 60*l.* 12*s.* 10*d.*, having been paid to the said master, and deducted with his concurrence from the sum awarded, a bill for the balance, namely, 359*l.* 7*s.* 2*d.*, was drawn and transmitted to the owner of The Fortitude, and that such bill was, at maturity, paid.

The rejoinder of the salvors denied that the reference to the arbitrators was made with their sanction and concurrence; and alleged that the declaration signed by them, as stated, was signed under an erroneous impression, that they were signing an affidavit of protest, which it was requisite for them to join the master in making as to the loss of their cargo of fish, in order to enable the owner of the smack to recover the value thereof from the owners of the brig upon their arrival in London. Lastly, that they had never received or been offered any remuneration on account of their services.

#### JUDGMENT.

DR. LUSHINGTON. It is not denied in the present instance, that at the time the salvors boarded this vessel she was in a state of considerable distress; neither is it attempted on the part of the owners to cast any imputation whatever upon the conduct of the smacksmen in the performance of the services which they have rendered. *Prima facie*, therefore, they are fairly entitled to a salvage remuneration. [ \* 43 ] It has been \* urged, however, on behalf of the owners of The Britain, that the merit of these services has been already estimated, and a salvage remuneration has been paid for the same, under an agreement entered into with the master and crew of The Fortitude, whilst that vessel was lying in the harbor of the New Deep in the river Texel. It is necessary, therefore, to look in the first instance to the asserted agreement in question. It is to the following effect: — “That it shall be left to the decision of the arbitrators to be named by each party, to fix the amount of remuneration that is due to Sulling, the master of The Fortitude, as well for his vessel as for himself and his crew, for the services rendered and loss of time, and likewise what shall be due to them in indemnification of the expenses incurred by having put into the harbor of the New Deep, and both parties renounce the right of any higher appeal.” Such are the terms in which the agreement is drawn up, and the document purports to be signed by Edward Taylor, describing himself as the authorized

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The Britain. 1 W. Rob.

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agent of the master of the smack, and by Captain Allison, the commander of The Britain, and Jacob Hoogland, sub-agent to Lloyd's for the Helder district, at Egmond-on-the-Sea. The question, then, which I have to determine is, how far this agreement is conclusive upon the parties promoting the present suit. Now, with respect to the master and the owner of The Fortitude, it would, I conceive, be decidedly conclusive; as it was clearly competent for the master, within the scope of the authority committed to him, to bind the interest of his employers and *à fortiori* his own. With regard to the interests of the crew, however, I do not think that, \*accord- [ \* 44 ] ing to any principles of justice, the master was possessed of any such authority.

It is, indeed, sworn by the master in his affidavit, that the appointment of Taylor, the agent to conduct the transaction, was made with the privity and concurrence of the mate and the rest of the crew of The Fortitude, but this is distinctly denied upon oath, in the counter affidavit which is before the court. If the master's account had been correct, his representation might have been confirmed by the affidavit of Taylor, the agent, but no such corroboration is supplied upon the present occasion. I must, therefore, incline to the statement of the mate and crew, that the appointment of Taylor to act in the business was made without their sanction or concurrence. With respect to the second point that has been urged on behalf of the owners of The Britain, that a great hardship will be inflicted upon them, if they are compelled by the decree of this court to make a second payment for the services in question; it is to be observed, that a still greater hardship will be inflicted upon the crew of The Fortitude, whose meritorious services are not denied, if the aid of the court should be refused them, and their services should be altogether unrewarded. Under the circumstances of the case, therefore, I must pronounce for the claim that is set up by the mate and seamen, and I shall decree the sum of 383*l.* 11*s.* 6*d.*, the balance of amount awarded by the arbitrators in Holland, to be paid by the owners of The Britain, and they must recover from the owner of The Fortitude the sum which has been already paid by them into his hands. I have been asked to direct an apportionment of the salvage so decreed. I therefore \*direct the money to be paid as follows:—134*l.* 4*s.* [ \* 45 ] 6*d.* to be paid to the owners of The Fortitude; 74*l.* 11*s.* 5*d.* to the master; 41*l.* to the mate; and the remainder to be divided amongst the rest of the crew, according to the rate of their respective wages.<sup>1</sup>

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<sup>1</sup> Upon the first session of Michaelmas term, November 5, 1839, the court was



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The Protector. 1 W. Rob.

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THE PROTECTOR, Edgar.<sup>1</sup>

July 16, 1839.

Construction of the Pilot Act, 6 Geo. IV. c. 125, s. 14.

The purport of the act is to take away the liability from the owners of a vessel doing damage, when the accident is occasioned by the fault of the pilot alone.

The *onus probandi* lies with the party claiming the exemption from liability conferred by the statute.

THIS was a cause of damage by collision, promoted by the owners the snow Berzelius, of Sunderland, against the bark The Protector. An appearance was given under protest for the owners of The Protector, and as a preliminary defence to the action, it was alleged in their act to the following effect:—"That on the 16th of February, 1839, The Protector arrived off Dungeness in the prosecution of her voyage from Cork to London; that the master there took on board a duly licensed pilot, and delivered the bark into the charge of the said pilot for the purpose of his navigating her to Gravesend. That about one o'clock, A. M., of the 17th, whilst under the direction [ \* 46 ] and in the sole \* charge of the said pilot, she came in contact with The Berzelius, then lying at anchor off the North Foreland.

"That in and by stat. 6 Geo. IV. c. 125, s. 14, it is enacted in the words following, to wit:—'And be it further enacted, that from and after the passing of this act, it shall and may be lawful for the lord warden of the Cinque Ports and constable of Dover' Castle, or his lieutenant for the time being, and they are hereby required to appoint and license fit and competent persons, duly skilled as pilots, for the purpose of conducting all ships and vessels passing from or by Dungeness up the river Thames or Medway,' within certain limits specified by the said section; and that 'all ships or vessels sailing as

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moved on behalf of the owners of The Britain, to decree a monition against the owner of The Fortitude, to bring in the money which had been transmitted to him from Holland on the smack's account, and of which he had made no distribution.

PER CURIAM. I should be most desirous to accede to this application, but I regret to say, that having given the matter every consideration, I feel that I have no jurisdiction to interfere as prayed; I must, therefore, leave the owners of The Britain to seek their remedy in some more competent court. Motion rejected.

<sup>1</sup> [See The Agricola, 2 W. Rob. 10; The Faura, Id. 184: The Maria, 1 W. Rob. 95; Abb. on Ship. (6 Am. Ed.) Part II. chap. vii.; The George, 2 W. Rob. 386.]

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The Protector. 1 W. Rob.

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aforesaid within such limits shall be conducted and piloted by such pilots, so appointed and licensed, and by no other pilots or persons whomsoever.'

"That in and by the same statute, s. 58, a penalty is imposed on the master of any ship or vessel who shall act himself as pilot, or who shall employ as a pilot any unlicensed person, and by section 58 of the same act it is further enacted, 'That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, when and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.'

"That by reason of the premises hereinbefore set forth, [ \* 47 ] the owners of the said bark Protector are not answerable to the owners of The Berzelius for the loss or damage by them sustained by the collision aforesaid. Wherefore, they prayed the judge to pronounce for the protest, and dismiss them and their bail from the suit," &c.

In reply to this act, it was alleged for the owners of The Berzelius, that the allegations set forth by the owners of The Protector, if available at all in discharge of their responsibility, were matters of defence and not of protest, wherefore they prayed the court to overrule the protest, and assign the owners of The Protector to appear absolutely, &c.

The case was argued in Easter term, by *Queen's Advocate* and *Addams* in support of the protest.

*Haggard* and *Nicholl*, *contra*.

#### JUDGMENT.

DR. LUSHINGTON. In this case, The Berzelius, a British vessel, laden with a cargo of coals, and bound on a voyage from the port of Tyne to Honfleur, was lying at anchor off the North Foreland, in February last, when she was run down by The Protector, also a British vessel, and was much damaged in consequence.

To obtain indemnity for their loss, the owners of The Berzelius have instituted the present proceedings; and the first point to which I shall address myself in considering the case, is the question of law arising from the fact of The Protector having a licensed pilot on

board at the time the collision is stated to have occurred. That there was a duly licensed pilot on board at the time is, I think, sufficiently proved; and I shall further assume, for the purpose of this [ \* 48 ] discussion, that an absolute \* appearance had been originally given by the owners of The Protector. That it had been pleaded, that The Protector was bound to take a pilot on board, that such pilot was in charge of the vessel at the time of the accident, and that such accident did not arise from any fault of the master and crew, or from mere misfortune, but (I am using the words of the statute) from the neglect or want of skill of the pilot. I do not say that it was necessary for the owners of The Protector to have pleaded all these circumstances; I shall, however, assume them for the present, for the purpose of arriving at the question of law, and I wish it to be understood, that in giving my judgment upon the law in this case, I give it upon such assumed state of facts. The question then is, whether under the statute pleaded (6 Geo. IV. c. 125) the owners of The Protector are legally responsible or not for the loss they have occasioned? And in considering this question, it is my duty, in the first place, to examine the precedents that have been cited from the cases decided by my predecessors in this chair. Now, the first case to which my attention has been directed by counsel in the cause, is that of The Neptune the Second, a case which occurred shortly after the passing the statute, (52 Geo. III. c. 39,) and which was decided by one of the most celebrated judges that ever sat in this chair. In that case, (reported in the first volume of Dodson's Admiralty Reports,<sup>1</sup>) the learned judge, it appears, in giving his decision, held the owners responsible, notwithstanding there was a pilot on board. It must, however, be observed, that the report in question contains not the least intimation of \* the decision having been made after due consideration of the statute then in force. It is wholly silent thereupon, and the judgment appears to have been founded upon the ancient law as it originally stood unaltered by any legislative enactment.

In delivering his judgment the learned judge is reported to have expressed himself as follows:—"The owners are responsible to the injured party for the acts of the pilot, and they must be left to recover the amount as well as they can against him." From these expressions of the learned judge, it is clear to my mind, that he knew nothing of the statute at the time he delivered his decision; for applying himself with great accuracy and equal care to the considera-

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<sup>1</sup> Vol. i. 467.

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tion of the case, he would never have expressed himself in these general terms without limitation, if he had contemplated the operation of the statute in question. On referring to my own notes made at the time, (and I was counsel in the case,) and to an opinion given by me three or four years after the decision, I am still further convinced, that the decision of Lord Stowell had no reference to the statute which had passed two years before; and when I see that in a case in a common law court, some years subsequently to this case, the statute equally escaped the attention of the counsel practising there, it is not surprising Lord Stowell should have been ignorant of what the legislature had so recently done, when he delivered his judgment in the case of *The Neptune the Second*. The decision in that case, therefore, is necessarily of no authority with respect to that statute, and of course could not be so with respect to one which passed subsequently. The next case in order of time

\* decided in these courts is the case of *The Christiana*,<sup>1</sup> re- [ \* 50 ] ported in 2 Haggard's Reports, and in that case (a case of collision in which the statute of 6 Geo. IV. c. 125, s. 55, the statute relied on by the owners of *The Protector*, was expressly pleaded) I observe that no reference was made to the case of *The Neptune the Second*. Now, if the decision in the case of *The Neptune the Second* had been considered available in behalf the owners in *The Christiana*, their counsel would assuredly have cited it, and *à fortiori* the learned judge, Sir C. Robinson, would have noticed it when he came to the conclusion which I am about to state. Sir Christopher Robinson, in deciding the case of *The Christiana*, was of opinion that the statute 6 Geo. IV. c. 125, was *prima facie* a protection to the owners of a vessel doing damage whilst a licensed pilot was on board; and that, unless it could be shown that the accident arose from the fault of the master and crew, the owners of such vessel could not be considered amenable for the loss. His words are these: "Unless it can be shown that the cause of action arose in a manner not imputable to the pilot, the court will admit the defence."

I now come to the judgment of Sir John Nicholl in the case of *The Transit*,<sup>2</sup> and in approaching the consideration of that decision, it is necessary that I should bestow much caution and attention upon it, because the case of *The Transit* is directly a case in point, and because the judgment of the learned judge who decided it is irreconcilable with the previous decision of Sir C. Robinson in the case of *The Christiana*.

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<sup>1</sup> Vol. ii. 183.

<sup>2</sup> [1 Month. Law Mag. 582.]

[ \* 51 ] \* Now referring to the case in question, I must observe, with great deference to the ability of Sir John Nicholl, that a mistake as to The Neptune the Second pervades the whole case. In delivering his judgment, the learned judge says, " I apprehend that the question of law is correctly laid down by a learned and eminent judge of this court in the case of The Neptune the Second, an authority which is completely in point and decisive of the present question." The learned judge, therefore, rested his judgment upon the authority of the case of The Neptune the Second, and in so doing he was clearly mistaken as to the grounds of Lord Stowell's decision, which, I have already noticed, had no reference to the statute then in force. There is also another point adverted to in the judgment of Sir John Nicholl, in which, I confess, with the greatest deference to his authority, that I cannot agree with him ; namely, his construction of the 87th section of the statute 52 Geo. III., upon which the learned judge greatly relied in support of the view he took of the intention of the act with respect to the jurisdiction of this court in these questions. The 87th section provides to the following effect :— " Provided always, that nothing in this act contained shall extend or be construed to extend to affect or impair the jurisdiction of the High Court of Admiralty." These are the words of the act, and the construction that the late learned judge put upon these words was this : that it was the intention of the legislature to leave the Court of Admiralty to administer the law as it stood before the passing of the act ; although, at the same time, it took away the action at common law against the owner ; in other words,

[ \* 52 ] that the act was to be no defence in a \* proceeding against a ship, although the collision arose from the neglect or want of skill of the pilot, and yet under the very same circumstances was a defence in an action at law. Now I must confess it appears to me, that this construction of the section in question would render inoperative the rest of the act, and could never be the construction the legislature intended to be put upon it. The true meaning of the section in my judgment is this : that the Court of Admiralty shall retain (by the provision of the statute in the particular case referred to) its jurisdiction to administer the law as altered by this act. In this opinion I am confirmed, when I look to the nature of the clause inserted in the 87th section. It is merely a saving clause preserving the jurisdiction of the court. Such clauses are subject to different considerations from other clauses ; they are frequently inserted *ex majori cautela*, and it is not necessary to show that they are intended to prevent any particular consequence from the act in which they are inserted.

In my opinion, therefore, the clause to which I have adverted cannot affect the present point. Its only object is to preserve the jurisdiction of the court, not to render inoperative the rest of the statute; and the true meaning of the legislature, in my apprehension, was to prevent any thing in the statute from taking away or impairing the jurisdiction of this court to administer the law according to the statute. With regard, then, to the decisions in the Court of Admiralty, the matter stands thus: the case of *The Neptune* the Second is no authority upon the point. The cases of *The Christiana* and *The Transit* are conflicting decisions, and I may here notice, that I do not observe that the case of \* *The Christiana* was [ \* 53 ] adverted to by Sir John Nicholl in delivering his judgment in the case of *The Transit*.

The question standing thus in this court, I next come to the decisions in the courts of common law which have been referred to in the argument, and which are reported in the 7th volume of Taunton's Reports; namely, the cases of *Bennett v. Moita*, and *Ritchie v. Bousfield*. Now, both these decisions distinctly affirm the proposition of exemption from liability, when the accident is occasioned by the fault of a pilot on board. In what respects they go further, I will consider presently. It is also to be observed, that these decisions can be reconciled with Sir John Nicholl's judgment in *The Transit* only by supposing, that by a proceeding *in rem*, a remedy to the extent of the value of the ship could be obtained, which could not be done by an action at law. Thus making a distinction in the two cases for which I myself can perceive no reason; and which I am sure was never contemplated by the learned judges by whom the decisions in question were delivered. Indeed, it appears to my mind almost an absurdity to suppose such a state of things as this, that the legislature could have passed an act which preserved entire the jurisdiction of the Court of Admiralty, leaving one remedy open to its fullest extent in that court, and yet to the same extent prohibiting a court of common law from doing any thing at all; enacting, that the fault of the pilot should be an exemption from liability before one judicature, and no exemption before another; and I see no reason to draw any argument from the statutes limiting the liability of owners in other respects to the value of the ship and freight.

In this conflict of opinions, I am bound to put my \* own [ \* 54 ] construction on the statute, and to look to the leading principles of justice and equity which may govern the present case. In so doing, I must observe, in the first place, that the words of the statute 6 Geo. IV. divesting this case of the obscurity arising from the construction which has been put upon the 87th section of the statute

52 Geo. III., are perfectly clear and intelligible. The words of the 55th section are these:—No owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel under or in pursuance of any of the provisions of this act.”

In the wording of this section, therefore, there is no obscurity, and the purport of it is in my opinion equally plain and obvious; namely, to take away the liability from the owners of a vessel doing damage, when the accident is occasioned by the fault of the pilot alone. This exemption in favor of the owners is undoubtedly a departure from the general law as it formerly prevailed in this court; but the principle upon which it is founded is just and reasonable. Where the appointment rests with the owner himself, as in the case of the master and crew, it is reasonable that he should be held responsible for their acts who are agents selected by himself; and he is bound to provide persons of adequate skill, diligence, and sobriety. But where a person is compulsorily put on board the vessel, and the owner's authority is superseded by legislative enactment, it would be a violation of all justice to hold such owner responsible for the skill, sobriety, and caution, of an individual with respect to [ \* 55 ] whom he has no \* power of selection; whose qualifications he has no opportunity of deciding upon, but which are to be ascertained and determined by others: the owner himself being entirely debarred from any possibility of interference. On the words of the statute, therefore, and upon principles of equity and justice, I am bound to hold the owners relieved from all responsibility, where the accident has been occasioned according to the words of the statute, “from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in charge of the vessel.”

In the view which I have thus taken of the question before the court, I find myself supported by the authority of the cases, *The Attorney-General v. Case*;<sup>1</sup> *Mackintosh v. Slade*;<sup>2</sup> and *Carruthers v. Sidebottom*.<sup>3</sup> These cases have been cited in the arguments of counsel, and they all tend to satisfy my mind of the correctness of the principle upon which my opinion has been formed.

In the case of *The Attorney-General v. Case*, reported in the third volume of Price's Reports, upon what ground was the vessel doing

<sup>1</sup> [3 Price, 302.]

<sup>2</sup> [5 Barn. & Cr. 657.]

<sup>3</sup> [4 Maule & Sel. 77.]

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the damage, and having a pilot on board, held not to be exempted from responsibility? The ground upon which the owner's exemption was overruled in that case was this, that the pilot was taken on board under a local act, and not under the general act; and that it was optional for the master to take one or not.

Again, what was the principle laid down by Mr. Justice Bayley in the case of *Mackintosh v. Slade*, reported in the sixth Barnwell and Cresswell? Why, the very principle I have adopted in the present instance; that where an owner is compelled to take a pilot on board, and a damage is occasioned whilst the vessel is under the management of that \*pilot, the owner is relieved from [ \*56 ] the responsibility. The words of Mr. Justice Bayley in delivering the judgment in that case were these, "We are of opinion, that the master was bound at the time to have a pilot on board, and consequently that the owners are exempt from responsibility."

Lastly, in the case of *Carruthers v. Sidebottom*, which was tried before Lord Ellenborough, that learned judge in delivering his judgment expresses his opinion in the following terms: "Does the master appoint the pilot? Certainly not. The regulation of the General Pilot Act imposes a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed within any limits for which pilots are lawfully appointed, and there is an exception for which pilots are not appointed. But if the master cannot navigate without a pilot, except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them."

Thus confirmed in my view of the present question, I am clearly of opinion, that upon this point of law, assuming all the facts to be as I have stated, the having a pilot on board in pursuance of the act will work an exemption from liability where the damage arises from the neglect, default, or incompetency of the pilot.

But there is another question, and one of no small difficulty, which still remains to be considered, and that question is, on whom does the *onus probandi* lie? Is it sufficient, in the first instance, for the \*owners of a vessel doing a damage to allege merely [ \*57 ] that there was a licensed pilot on board, and upon that simple averment to claim exemption from liability, unless the other side can prove the damage not to have arisen from the fault of the pilot?

It would, indeed, relieve my mind from great difficulties, if I could



with propriety at once adopt that conclusion; but I must confess, that notwithstanding the authority to which I shall presently advert, I am unable to satisfy myself of its correctness. For how stands the case? The general liability of vessels doing damage remains as it was. The ancient rule of the admiralty and common law are not abolished. The effect of the act is merely this, that the liability is restricted to certain cases; and the extent of that liability limited to the value of the ship and freight. But the great principle that a wrong-doer is responsible to the injured party, saving in the excepted cases, continues unaltered. Is it not incumbent, then, upon the parties who claim an exemption from a general liability by reason of a special legislative enactment to show the grounds on which the exemption is claimed; and if, as in these cases, the exemption is rested upon the fact that the accident was the fault of a pilot on board, are they not bound to prove the misconduct of that pilot? Can the court infer, in all cases, that a collision arises from his fault? It may be accidental, or arise from the fault of the master or mariners, or even from some defect of the vessel itself. How can I then throw the *onus probandi* on the owners of the vessel which has received the damage? It is almost impossible they could prove it. The acci-

dents in cases of this kind most frequently occur in the [ \*58 ] darkness of the night; in such cases, then, how \*is the owner of the suffering vessel to prove that the collision arose from the fault of the master, or the neglect or misconduct of the crew on board the vessel by which the damage is occasioned? He has no means of so doing, and it would, I conceive, be an aggravation of the injury, if this court were to impede the attainment of his redress, by imposing demands upon him which in the majority of instances he would be wholly unable to satisfy.

I am aware, that in the view which I have thus taken, I have to encounter authorities against me, and it would have been a great relief to my mind if I had felt myself at liberty to have adopted those authorities at once, and delivered my judgment in conformity with them. But I feel that I should not be justified in doing so in a case of this description, unless there had been a regular course of precedents to support me; and the decisions had been made upon discussion and a full consideration of all the difficulties. I should be only accumulating decision upon decision, and adding error to error, if I were to refuse boldly to exercise my own judgment, and blindly follow a precedent which may have result from a totally different form of action, and which, in truth, might prove no precedent at all.

What, then, are the authorities that are against me upon the pre-

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The Protector. 1 W. Rob.

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sent occasion? The first case is the case of *Bennett v. Moita*,<sup>1</sup> in which the action was against the master, and there was no evidence to show whether the accident was occasioned by the personal misconduct or negligence of the pilot or of any other person.

The cause was originally tried before Lord Chief Justice Gibbs, at the sittings after Michaelmas term, 1816; and that learned judge directed a \* nonsuit, upon the ground that the master [ \* 59 ] was not answerable unless it were expressly proved that the damage was occasioned by the neglect or default of the master himself or of his servants. In the following term, a motion was made before Mr. Justice Dallas, assisted by Mr. Justice Park and Mr. Justice Burrough, to set aside the nonsuit, and direct a new trial; and, in overruling the motion, it was observed by Mr. Justice Dallas, that it must be presumed that the damage was occasioned through the negligence of him who has the management of the ship, and that within the Thames is by law committed to the pilot, of which fact the statute is notice to all the subjects; and it must be taken, that whatever happens by the ship in the course of that navigation must be imputed to the pilot, unless he show that his orders were disobeyed. Such were the observations thrown out by the learned judges by whom the case of *Bennett v. Moita* was decided; and from these observations, it is clear, that the difficulties which the owner of the suffering vessel must encounter, were in no degree noticed. In this court these difficulties would be infinitely increased by the very form of the usual proceedings, in which no opportunity would be afforded to the injured party of examining the witnesses on board the vessel doing the damage.

The next case is the case of *Ritchie v. Bousfield*,<sup>2</sup> which was tried in the same term and before the same judge. In this case the collision took place in the Thames, the defendant's vessel having a pilot on board, and the plaintiff's not. No evidence was given of any interference by the master with the pilot's management of the ship, and the jury found a verdict for the plaintiff with considerable damages. \* In this case, again, the observations thrown [ \* 60 ] out by the court are open to the same remark, that no notice was taken of the difficulties to be encountered by the party receiving the damage.

The last case is the case of *The Christiana*,<sup>3</sup> in which Sir C. Robinson appears to have adopted the same doctrine. "Such a defence," Sir C. Robinson says, "properly introduced, might avail under the

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<sup>1</sup> [7 Taunt. 258.]

<sup>2</sup> [7 Taunt. 309.]

<sup>3</sup> [2 Hagg. 183.]

authority of the case of *Bennett v. Moita*, for I should be disposed to act on the same principle, if no facts should be alleged on the other side to take off the general presumption, that the pilot being the person intrusted with the navigation of the ship, was the person to whom the injury arising from the collision should *prima facie* be attributed. In this case, however, it is to be observed, that the point was not directly brought under the consideration of the learned judge." I have now gone through the authorities that have been relied on by the counsel for The Protector in arguing this case, and with the greatest deference to the opinions of the learned judges by whom the cases in question were decided, I confess that in my judgment, the defence to an action of this description, in this court at least, must extend beyond the limit to which the authority of these cases would confine it.

In my view of the subject, it is not a sufficient defence merely to allege that a pilot was on board the vessel doing the damage at the time the accident occurred. To bring himself within the exemption from liability conferred by the statute, the defendant must go further, and show that his case comes within the purview of the present law, and that the damage arose according to the very words of [ \* 61 ] the statute from or by reason or means of some \* neglect, default, incompetency, or incapacity of the pilot so taken on board.

It only remains for me to consider what course I must adopt under the circumstances of the present case. With regard to the form of the proceedings, considerable difficulty may have arisen from the practice on both sides. On behalf of the owners of The *Berzelius*, the facts are set forth at considerable length, and, in their rejoinder to the act, it is expressly alleged by them, that a good look-out was not kept on board The Protector. To the averments so made on their side, the plea that has been set up by the owner of The Protector is no answer at all; for it could not, I presume, be contended, that the owners of that ship were within the exemption, if the accident arose from the negligence of the master and crew in not keeping a good look-out. In such a case I should have no hesitation in pronouncing that the owners of the vessel doing the damage were clearly responsible.

The course, therefore, which I shall pursue in the present instance, is this. I shall permit both parties to withdraw the pleas they have respectively given in, and I shall allow them to bring in a further act with reference to the observations I have made, or to write further to this act, so as to bring the facts under my consideration.

If it should hereafter be shown that the collision arose from the fault or incapacity of the pilot, the owner of the vessel proceeded

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The Manchester. 1 W. Rob.

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against will be exempted from the consequence of such collision ; if, on the other hand, the damage shall appear to have arisen from the negligence or misconduct of the crew of The Protector, then the owner of that vessel will be liable. I therefore overrule the protest, \* and assign the owner of The Protector to appear [ \*62 ] absolutely ; and I wish it to be understood, that, for the future, there must be no appearance under protest in any of these cases, except where there is a real question as to jurisdiction.<sup>1</sup>

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THE MANCHESTER, Macleod.

July 16, 1839.

In causes of collision, the confession of the master is admissible in plea.

THIS was a question as to the admissibility of a libel given in by the owners of The Concord, (the promoters of the suit,) in a cause of damage by collision. The objection to the libel was, that it pleaded *inter alia* the confession of the master of The Manchester, the vessel proceeded against, that his vessel was in fault.

In support of the objection, *Haggard* and *Nicholl* argued —

That it was incompetent to plead such confession, inasmuch as the master was merely the servant of the owners, and was possessed of no share in the vessel in question ; that in an action at common law for damage done by a carriage on the high road, the confession of the coachman that he was in fault would not be received as evidence against his master ; that although, in the summary proceedings of this court, where the suit is carried on by act on petition and affidavits, such confessions have been received, yet, that, in the more solemn form \* of proceeding, as in this case, by [ \*63 ] plea and proof, no case was recorded in which a similar confession had been allowed by the court.

*Queen's Advocate* and *Addams*, *contra* —

'That the objection raised was a novel objection, and there was no

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<sup>1</sup> The case came on for final hearing at the first session of Michaelmas term, November 5, 1839, when the court was of opinion that the damage was imputable to the fault of the pilot alone, and dismissed the owner of The Protector from the suit.

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The Valiant. 1 W. Rob.

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instance on record in which a similar objection had been taken and sustained by the court; that although the master was not a part owner in the vessel, he was nevertheless personally responsible for the damage he had done, and proceedings might be instituted against himself individually by the owner of The Concord. His confession, therefore, was of the greatest importance, and clearly admissible. Lastly, that he represented the owners at the time of the accident; he was their agent, and by his act they were bound within the sphere of the authority with which they had intrusted him.

PER CURIAM. It is true that, with regard to an ordinary witness, it is not competent to plead his declarations, and for this reason, that interrogatories may be put to him on the subject of his declarations, and, if he denies them, such declarations may be pleaded in an exceptive allegation for the purpose of attacking his credit, and his credit only. The master of this vessel, however, appears to me to stand upon a different footing in point of law. He was the agent of the owner in the navigation of the vessel at the time the accident occurred; whatever was done by him, therefore, imposed responsibility upon the owner who had chosen and selected him, and may fairly be brought against the owner in this cause. For this [ \* 64 ] reason, I am inclined to think that his confession is admissible; and I have the less hesitation in admitting this part of the plea, because I do not see that any serious prejudice can arise to the owner by its admission. It is competent for them to examine the master on a plea directly contradicting the declaration, and denying that it ever was made, if it should appear important for them so to do. I must, therefore, overrule the objection that has been taken to the admission of the libel.

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THE VALIANT, Griffiths.

July 16, 1839.

In cases of possession, the court looks to the legal title, and not to a beneficial or equitable interest in the asserted part owners.<sup>1</sup>  
 [Possession not changed on application of a minority of shares.]<sup>2</sup>

THIS was a cause of possession promoted by certain part owners

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<sup>1</sup> [5 C. Rob. 155.]

<sup>2</sup> [The Elizabeth and Jane, 1 W. Rob. 278; The Egyptienne, 1 Hagg. Ad. R. 346, note.]

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The Valiant. 1 W. Rob.

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in this vessel, under the circumstances noticed in the judgment of the court.

For the promoters of the suit, *Addams*.

*Queen's Advocate, contra.*

#### JUDGMENT.

DR. LUSHINGTON. In this case the warrant was extracted upon the 12th of January last, at the suit of John Thomas, alleging himself to be the owner of twelve shares in this vessel; William Evans, the owner of two shares; Eliza Thomas, widow, of four shares; William Owen, of eight shares; John Owen, of four shares; Eliza Davis and Ann Davis, spinsters, of one sixty-fourth part and one seventh of a sixty-fourth part; and William Davis, also the owner of one sixty-fourth part and one seventh of a sixty-fourth part.

The vessel was registered at Cardigan, in the month of January, 1826, and upon the face of the register it is to be observed that only sixty-two parts, or shares, appear to have been entered. With respect to the remaining two parts, it is alleged by the proctor for \* the promoters of the suit, that they are held by the registered owners, in proportion to their respective registered shares. It is also further alleged in the act given in by the promoters of the cause, that they are the holders of thirty-two shares and two sevenths of a sixty-fourth part; and assuming the fact to be so, they would clearly be possessed of more than a moiety of the registered shares, besides a title in the unregistered shares, in proportion to their registered interests.

On the other side, an appearance has been given on behalf of David Griffiths, who alleges himself the owner of eight shares; Eliza Morgan and Margaret Davis, executors of Ann Morgan, who was possessed of eight shares; Edward Morgan, of two shares; Lætitia Davis, as executor of John Davis, the owner of two shares; Ann James, the administratrix, with the will annexed of John Davis, of Newport, the owner of eight shares; Stephen, Henry, and Mary Gorzon, executors of William Gorzon, the owner of six shares; comprising, altogether, thirty-four shares.

Objections have been taken, both upon the one side and the other, to the validity of some of these asserted interests. It has been objected on the one side, that Eliza Davis and Ann Davis, who are included amongst the promoters of the present suit, as having an interest in the vessel to the extent of one sixty-fourth part, and one seventh of a sixty-fourth part, are legatees only, and, as such, are

possessed of a mere equitable and no legal interest in the property in question, and that their interest is, in fact, represented by Ann James.

It is also further objected, that William Davis died previous to the arrest of the vessel, and that his personal representatives have given no authority to the proctor to proceed in the cause. On the other side it is objected, that Ann James, as administratrix, with the will annexed of John Davis, has no legal interest in the eight shares, or parts of which the testator was possessed, at the time of his decease.

Now, with respect to the objections so taken, I am of opinion that Eliza Davis and Ann Davis have no *persona standi* in this suit as legatees only, and that the bequest to them being vested in trustees for their benefit, they have only an equitable interest in this vessel, and that it is not competent to this court to take cognizance of such an interest. I have examined the cases which have occurred in the time of my predecessors, and I find that it is to a legal, and not to a beneficial or equitable interest, that any attention is paid in cases of this description.

In the case of *The Sisters*, reported in the 5th volume of Robinson's Admiralty Reports, what is the language used by Lord Stowell? He says, "Bound down as this court is to decide on the legal title without taking notice of equitable claims;" and again, in the case of *The Frances*, reported in 2 Dodson, p. 424, he says, "It is only in clear cases that the court would interfere, where the instrument itself, as well as the proportional shares of the parties, are free from objections." I am, therefore, clearly of opinion, that the asserted interest of these parties must be deducted, which would reduce the interest of the promoters of the suit to thirty-one shares and one seventh of a sixty-fourth share or part.

[ \* 67 ] I also think that the share of William Davis must be deducted, as he has died since the commencement of the suit, and his personal representatives have not given the proctor any authority to proceed in the cause. This would further reduce the asserted interest of the promoters to thirty shares in the property of this vessel.

With respect to the objection taken on the other hand against the asserted interest of Ann James, I think that as administratrix with the will annexed of John Davis, she cannot represent the testator, because the shares are given directly to trustees, who, I apprehend, are possessed of the legal interest, subject to her claim, to have the shares sold for the purpose of paying the debts of the testator.

I must, therefore, deduct eight shares from the interest of the parties opposing the present application. This would leave them in pos-

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The Swan. 1 W. Rob.

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session of twenty-six shares; and as it must be presumed that all those who do not apply are satisfied that the possession of this vessel should not be altered, they would still be possessed of the majority of interests. It is unnecessary for me to travel further into the facts of the case to justify the conclusion to which I have arrived. I am of opinion, that this court can never proceed to change the possession, save at the application of a majority of the whole of the legal interests; and the parties applying in this case, clearly have no such majority.

I must, therefore, pronounce against the present application, and as the parties who make it have thought fit to contest the right to the possession of this vessel without sufficient grounds in law, I must pronounce against their claim with costs.

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\* THE SWAN, Dring.

[ \* 68 ]

July 16, 1839.

Salvage awarded for the rescue of a fishing vessel frozen up in Davis's Straits.

Government bounties having been granted for the rescue of the vessel, the claim of the salvors for demurrage and the payment of stores not allowed by the court.

An asserted custom for vessels engaged in particular voyages to render assistance to each other gratuitously, must be founded upon the principle of mutual benefit and protection of property.

[Effect of delay in instituting suit for salvage.]<sup>1</sup>

THIS was a cause of salvage promoted by the masters, the owners, and the crews of three vessels, The Princess Charlotte, The Heroine, and The Dorothy, for services rendered under the following circumstances :

The vessel proceeded against, sailed from the port of Hull, on the 13th of April, 1836, on a fishing voyage to Davis's Straits, and was there frozen up, together with other vessels, in the month of October following.

Bounties having been offered by the lords commissioners of the treasury for the rescue of the crews, several ships went out from this country in consequence : and upon the 14th of May, 1837, The Swan was discovered by the salvors beset in a floe of ice in latitude 69° 5' N.,

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<sup>1</sup> [The Clifton, 3 Hagg. Ad. Rep. 117; The Rapid, 3 Hagg. Ad. R. 419.]



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The Swan. 1 W. Rob.

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having at the time only nine days' provision on board, many of the crew dead, and most of the survivors confined to their berths by scurvy. By the exertions of the salvors, a channel was cut through the ice three hundred and seventy-six yards in length and twenty-six yards in breadth, the average thickness of the ice being between three and four feet, and after two days' and nights' incessant labor, she was finally released on the 21st of May, and enabled to return to her port of discharge in this country.

In opposition to the salvors' claim, it was pleaded, on behalf of the owners of *The Swan*, that it is the invariable recognized practice in the whale fisheries, for vessels to render gratuitous assistance to each other in all cases of danger and peril; that the summer season had commenced, and the ice was rapidly breaking, and that within a week or ten days from the time when she was discovered by the salvors, the vessel would have driven into open water. Lastly, that the bounties offered by the treasury commissioners would constitute a sufficient remuneration for the services which had been rendered.

For the salvors, *Addams* and *Harding*.

For the owners, the *Queen's Advocate* and *Curteis*.

#### JUDGMENT.

DR. LUSHINGTON. Upon the general facts of this case, no material contradiction or dispute is raised in the present instance. It appears that the vessel proceeded against was frozen up in Davis's Straits in the month of October, 1836; and in the month of May following, was rescued by the exertions of the asserted salvors, assisted by the boats of two other vessels, whose owners do not come forward in this suit. *Primâ facie*, therefore, the asserted salvors would undoubtedly be entitled to a salvage remuneration for the service which they have performed.

It has been alleged, however, in bar to their claim, that it is the invariable custom for vessels engaged in the whaling fisheries to render any species of assistance to each other gratuitously; and in the reply to the act on petition given in by the owners of *The Swan*, it is expressly averred, that the master of that vessel was induced to accept the service which had been rendered, by a reliance on this particular custom.

Now, in delivering my decision, I do not intend to give any opinion as to the existence or validity of the alleged custom in question; because I think that it is no part of my duty to deter-

[ \* 70 ]

mine whether it is a legal custom or not, unless the circumstances of the case especially require me to decide the point. In ordinary cases, such a custom, if it has any legal existence, would certainly be entitled to the greatest possible weight, and ought to be upheld, and I should not be disposed to overrule it, notwithstanding that, in some instances, the custom may not have been observed. But assuming the custom to exist as stated, it is clear that it cannot apply to the circumstances of this case, and for this reason: that if the custom has any legal foundation at all, it must be founded upon the principle of mutual benefit and protection of property, and upon the assumption that the parties are embarked in a common enterprise, and whatever service is mutually rendered may be mutually required, "*Antique accipiuntque vicissim.*" This consideration, it is obvious, cannot apply to the facts of the present case. The Swan had been detained in the ice during the whole of the winter, and was still frozen up. She was not, therefore, embarked at the time this service was performed, in the operation of any joint enterprise with the other vessels, and it is quite impossible that she could have rendered assistance to any other vessel whatever. What, then, would be the consequence, if I were to hold that the asserted custom applied to this case? I should, in so doing, take away all hope of future assistance being rendered to vessels under similar circumstances, by taking away the inducement for rendering the assistance, namely, the hope of remuneration.

Being of this opinion, that the alleged custom cannot operate upon the case immediately before me, I have now to consider what is the nature of the \*service which has been rendered, [ \* 71 ] and what is the proper amount of the reward. Now, without entering into a consideration of minute details, I am clearly of opinion, that it was a service efficiently rendered; and one that was absolutely necessary for the safety of the vessel and her cargo, and also for the preservation of the lives of the persons on board. It has been suggested, that from the near approach of summer, it was probable that the ice would have dissolved, and that the vessel would have been released without the intervention of the salvors' assistance. But when I look at the protest made by the master and others of the crew who have signed it, I confess that I am led to a very different conclusion. In the first place, I think that it would have been difficult for the master to have rescued his vessel from the perilous situation in which she was placed, by any exertions that could have been made by the surviving crew, disabled as they were by scurvy from their long confinement. In the next place, the want of provisions would have rendered it impossible that any effectual efforts could have been

made. It is also to be borne in mind, that the master himself, in his protest, represents the vessel as in very considerable danger. Under the circumstances of the case, therefore, I think that, even assuming that the weather would have dissolved the ice and set the ship free, the probability is, that the crew would have been unable to navigate her, and there would have been a chance that the ship, together with her stores and cargo, would have been entirely lost to the owners.

In order to enhance the merit of the service, on the one [ \* 72 ] hand, it has been stated, that considerable \* loss was probably occasioned to the salvors by the delay which they experienced in prosecuting the whale fishery, in which the vessels were severally engaged. On the other hand, it has been pleaded in diminution of the salvage, that the vessels have been already rewarded for the service, and that such reward is of the nature of salvage. Now, it cannot be doubted, that the object of the lords commissioners of the treasury, in offering the bounty, was the rescue of human life, and that the motive of the application made to the government for assistance, was founded on the risk to which the lives of the sailors on board the ice-bound vessels were exposed. So far, therefore, as relates to the bounty for early sailing, I shall not be justified in taking that into my consideration in allotting the *quantum* of salvage; but with regard to demurrage, and the payment of stores, I am clearly of opinion, that the owners of the salving vessels have been already indemnified for any loss which they may have experienced, and that they are not entitled to be further remunerated for such loss.

The only remaining circumstance which I think it necessary to advert to is, the delay which has occurred in preferring the present claim; and I must say, that it is a circumstance deserving of no small consideration. If the demand was founded on justice, it should have been made before. The Princess Charlotte arrived in this country in October, 1837; the owners, therefore, might have proceeded in this suit at a much earlier period. It has been said, that negotiations were being carried on, but that is no satisfactory excuse. If a salvage service was rendered, the salvors were entitled to come [ \* 73 ] \* to the court for a salvage remuneration, and they might have brought their case before the court within a less period than fifteen or sixteen months.

Looking at all the facts of the case, I am of opinion that a very considerable service has been rendered, and I think that I do not exceed the fair *quantum* of remuneration in allotting the sum of 700*l.* for salvage. I am asked to apportion this allotment between the respective salving vessels. I therefore award the sum of 300*l.* to The Princess Charlotte, and 200*l.* to each of the other vessels.

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The Blake. 1 W. Rob.

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## THE BLAKE, Hadden.

July 26, 1839.

## Claim for wages sustained.

The rule by which the court is guided in cases of this description, is, that the wages may be forfeited, not in cases of discharge for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship, and the due preservation of discipline.

Misconduct on the part of the master and officers not alien to the question in cases of this description.

Where misconduct is set up against a suit for mariners' wages, by the owners, the court has no power to mitigate the penalty; it must pronounce against the whole claim, or for the whole claim.

The court draws a strong line of distinction between disobedience of orders in port, and any insubordination whatever when the vessel is on the high seas.

THIS was a case of mariner's wages.

For the mariner, *Addams* and *Robertson*.

For the owners, *Queen's Advocate* and *Nicholl*.

## JUDGMENT.

DR. LUSHINGTON. This is a suit for wages, promoted by a seaman who served on board this vessel for twenty-two months in a voyage from Liverpool to the East Indies, and back to England. That the mariner did seriously misconduct himself during a part of the time he was on board, is admitted in the summary petition given in on his behalf, and it is also substantiated by the evidence of his own witnesses in the cause. The question, then, which I have to determine, is, whether, by such misconduct, he has forfeited the wages to which he would otherwise be legally entitled; and in forming my opinion upon this point, I feel that I should not do justice in confining myself to a single isolated transaction, without taking into my consideration all the important circumstances \* that occurred [ \* 74 ] during the lengthened voyage in question.

Before I enter into the consideration of these circumstances, I shall briefly advert, in the first instance, to the general principles by which the court must be guided in cases of this description; although I fear that it is impossible to lay down any rule so definite as to meet the circumstances of every case, or the great majority of cases that may occur.

In the case of *The Exeter*,<sup>1</sup> referred to by Lord Tenterden, in his

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<sup>1</sup> [2 C. Rob. 261.]

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The Blake. 1 W. Rob.

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Treatise on Shipping, Lord Stowell has expressed himself to the following effect: — "That any cause which will justify a master in discharging a seaman during the voyage, will also deprive the seaman of his wages." Now, with great deference to Lord Stowell's opinion, I must observe that, in my judgment, the principle thus laid down furnishes but a very insufficient test, and one which cannot be uniformly adopted and acted upon with safety. The justification of the master in discharging a seaman for misconduct during the voyage, must depend upon circumstances continually varying, and to a great degree unconnected with the quality of the offence itself; as, for instance, the place where the misconduct occurred, whether at sea or in a British settlement, or in a foreign port; it must also be governed by a consideration of the restrictions which are imposed by Sir James Graham's Act. The mere discharge of a seaman, therefore, for an offence committed in the course of the voyage, can hardly be a test, unless the character of the offence be such as to make the discharge of the offender absolutely necessary for the safety of the ship. The

rule, then, which I would take to guide me, is this, that the [ \* 75 ] wages may be forfeited, not in \*cases of discharge for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship and the due preservation of discipline.

Having thus far discussed the principle which is to govern my judgment in this case, I now proceed to consider whether the whole of the circumstances disclosed in the proceedings establish such misconduct upon the part of the mariner as will necessarily work a forfeiture of his wages; and here the following observation most forcibly suggests itself to the court, namely, that as, under the existing state of the law, the penalty cannot be mitigated, and the whole wages must be forfeited, or none at all, the facts which call for such a penalty must be of a very strong description, and should be clearly established by the evidence in the cause.

The facts of the present case are shortly these: —

In March, 1837, the vessel sailed from this country for Bombay and China, and in September, 1838, arrived at the Cape of Good Hope, on her return voyage to England. At this place a circumstance occurred which I am bound to notice, as having an important bearing upon the question which I have to decide. I advert to the fact that, at the Cape of Good Hope, William Thompson, the master of the vessel on the outward voyage, and also from China to the Cape, and the chief mate, were found guilty of having occasioned the death of a seaman on board the vessel, and that the master was sentenced to fourteen years' transportation, and the mate to three years' imprison-

ment, in consequence. It has been suggested in the argument, that \* this circumstance has no bearing upon the question at issue in this case; but I am of a different opinion.

It may be true that the alleged misconduct of the mariner occurred at a different place, and when the vessel was commanded by a different master; but when I see a circumstance of this kind occurring on board a merchant vessel, the owners of which contend for the forfeiture of the entire wages of one of the crew, upon the ground of misconduct, I cannot but think that such a circumstance is by no means alien to the decision of the question which I have to determine. The discipline of the ship must have been necessarily weakened in the first instance, and the crew have been tempted to commit offences by the example thus set them by the very persons who were invested by the owners with the control and authority on board this vessel; and it was the duty of those owners (the importance of which duty I will never cease to impress as long as I sit in this chair) to have exercised the greatest circumspection in the selection of the master, upon which the safety of the property so materially depended.

Being then of opinion that the fact to which I have adverted has a decided bearing upon the question at issue, I now proceed to the other facts of the case, and in so doing I am relieved from the necessity of entering into the details of the circumstances which occurred previous to the arrival of the vessel at St. Helena; not because there were no grounds of complaint up to that time, but because it is impossible to contend that any misconduct is proved, prior to the ship's arrival at that port, which could entail forfeiture of the wages. For the facts which occurred \* subsequent to the [\*77] ship's arrival at St. Helena, I refer, in the first place, to the details set forth in the summary petition given in by the mariner.

The petition, after stating that the vessel arrived at St. Helena on her return voyage upon the 1st of November, intending to make a short stay at that island, and then to proceed to England, sets forth in third and fourth articles, "That on the night of Saturday, the 3d, several of the crew, including Kendall, drank to excess and became intoxicated; that at half-past four the next morning, the mariner, the party in this cause, and others of the crew, were called up to heave the anchor, but that when they came on deck, being still in a state of intoxication, they refused to obey the order, and again went below; that about half-past six, A. M., Captain Hadden, the master, who had been appointed to the command at the Cape of Good Hope, a second time ordered the crew, including Kendall, to get up the anchor, when six of the crew, including the said Kendall, again refused to obey such order, being still as before in a state of intoxication; that the

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The Blake. 1 W. Rob.

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master, thereupon, sent on board her Majesty's ship Fair Rosamond, at that time lying at anchor at St. Helena, for assistance; that the commander and one of his officers immediately came on board The Blake, when the order to the men to proceed to their duty was renewed, but which order (being still under the influence of liquor) they refused to obey; that Owen Williams and Robert Fullarton, two of the crew, were, thereupon, taken on board The Fair Rosamond, but that they subsequently volunteered and were not taken as prisoners; and that the master of The Blake gave to each of them an order for the balance of the wages due to them up to [ \*78 ] "that period;" and the summary petition then sets forth in conclusion, "that in a very short time after this took place, Kendall, the mariner, returned to his work, and discharged his duty on board The Blake during the remainder of the voyage, till the arrival in the port of London, when he was discharged, the ship having completed her voyage." Such is the account given by the mariner himself of the occurrences that took place after the arrival of the vessel at St. Helena.

On the other hand, the responsive allegation which has been given in on the part of the owners, pleads certain variations from, and contradictions of the facts as they have been thus represented by the mariner. It is alleged in their allegation, that there was a mutinous combination on the part of the crew; that the crew were not so much intoxicated as to be incapable of performing their duty; that Owen Williams, (who appeared to be one of the ringleaders,) being ordered by Shepherd, the chief mate, to go forward, shook his fist in his face in a threatening manner, and used very abusive language. It is also further stated, that when several of the crew, in obedience to the order of the master, went to the windlass to heave the anchor, Kendall, Williams, and Fullarton did every thing in their power to impede the work, and tried to take men from their bars; and William Kendall threw a handspike at William Thompson, one of the crew then at the windlass, and hit him on the head; and it is lastly alleged, that the two men were sent on board the man-of-war as prisoners and not as volunteers.

Now the material points of difference between the two statements thus made upon the one side and the other are confined to [ \*79 ] the following: the first relates to the conduct of Owen Williams; the second to the act committed by Kendall himself, in throwing a handspike at William Thompson; and lastly, there is the general result of their conduct, which is charged as an illegal and mutinous combination. The last of these is the most important, and more especially demands the earnest consideration of

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The Blake. I W. Rob.

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the court; and in approaching the consideration of this part of the case, I naturally inquire, in the first place, if there was a regular conspiracy amongst the crew on board this vessel to commit an act of disobedience, what was the cause which led them to such conspiracy? If it be a case of conspiracy, there must have been some peculiar cause, and something of the nature of a plan to resist the authority of the master. I have looked into the evidence with the greatest care for the solution of this question, and I must confess that it does appear to me that (although there are circumstances stated in the defensive allegation showing something of a mutinous conduct upon a former occasion) there is a total absence of all proof of any deliberate combination or concerted conspiracy amongst the crew during the time this vessel remained at St. Helena. Of any united and concerted disobedience of orders, of conduct on their part which is the result of cool and deliberate forethought, I cannot find any trace in the evidence. There are no facts proved which lead me to such a conclusion. On the contrary, the *res gestæ* are of a totally different character. It appears that on the 3d of November, the crew were intoxicated, and from the evidence in the cause I find that they had been during the whole night occupied in drinking. It is stated by one or two of the witnesses, that in addition to their Saturday \*night allowance, they got six bottles of liquor from another [ \*80 ] ship, which were given to them as a present, and the consequence was they continued during the night singing and drinking; although it might not be known to the master that the men were so occupied, the fact was at least notorious to some of the mates. It also further appears that about half-past four o'clock in the morning, whilst the men were in this state of inebriety, orders were given to raise the anchor, and what followed? Insolence, insubordination, and disobedience of the orders of the master and mates. Now I do not say that this conduct on the part of the crew was not very reprehensible, that it was not extremely culpable conduct, but the question which I have here to examine is, whether such conduct would lead to the conclusion, that there existed any deliberate combination on their part to set the master's authority at defiance?

In my opinion, the *res gestæ* of the case to which I have already referred, tend to negative any such conclusion, and the consideration of these is of the greatest importance in deciding this point; because, when there is a deliberate plan concerted beforehand amongst the crew, being a state of sobriety, the conduct of the parties will bear a very different complexion from an accidental and temporary disobedience of orders arising from circumstances of a different description.

Having thus disposed of the general charge of combination and



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The Blake. 1 W. Rob.

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conspiracy alleged by the owners in their defensive allegation, I must next consider whether the particular conduct of this individual mariner has been such as will entail the total forfeiture of his wages.

[ \* 81 ] Looking to the evidence that has been produced in support of the owner's allegation, if I were to take Captain Hadden's testimony alone, I am clearly of opinion, that he does not depose to such facts as would entail any such penalty upon him. In his evidence on the eleventh, twelfth, and thirteenth articles, Captain Hadden deposes to this effect. He says, " We sailed from the Cape of Good Hope on the 20th of October last, homeward bound, and arrived at St. Helena in ten or eleven days. We remained there three days, and sailed thence in the morning of Sunday, the 4th of November. Early that morning, at daybreak, I desired the chief mate to call up the crew to heave the anchor up and get under weigh; in about three quarters of an hour after I had given such order, I went on deck, and whilst I was getting on my clothes, one of the crew, Owen Williams by name, came into the cuddy. I asked him what he wanted there: he replied, ' We want to go on shore.' I ordered him out of the cuddy, and desired him to go to his duty. He said that he would see me d——d first, before he would go to sea that day. He persisted in remaining in the cuddy, and being in a weakly state of health at that time,"— (and here I would observe that the court does not attribute the blame of this transaction to the master; he was ill at the time, or I am sure he would not have suffered his crew to have remained drinking all night) — "being in a weakly state," the master goes on to say, " I was unable personally to turn him out. Shepherd, the mate, came and ordered Williams forward, when he left the cuddy. I heard a good deal of swearing outside the cuddy, and the voice of Owen Williams in particular.

When I had finished dressing and came out of the cuddy, I [ \* 82 ] found the chief part of the crew, amongst whom were William Kendall, Owen Williams, and Robert Fullarton, aft on the quarter deck and near the poop, their proper station at that time being forward of the mainmast. I went upon the poop and ordered the crew to man the windlass; there was a general answer given that they wanted to go on shore. One of them in particular, Robert Fullarton, in answer to my order said he would see me d——d first. Several of the crew who were willing to work assembled at the windlass and attempted to heave it round, but were unable for want of sufficient hands. I returned from the poop to the cuddy, and, whilst there, heard a deal of quarrelling and fighting upon deck, but I did not exactly see what took place." Captain Hadden then pro-

ceeds to state :—“The crew were not drunk upon that occasion.” (And here I must observe, that this part of his evidence as to the absence of intoxication, is directly in contradiction of the general evidence adduced by the owners, and almost to the whole in the cause. Captain Hadden was unwell and did not observe it, and was, moreover, ignorant of the fact of their having been drinking all night.) “At the end of about an hour,” he then says, “after I had gone into the cuddy, finding the people tolerably quiet on deck, I again went up on the poop, and called all hands aft ; they mustered about the capstan ; I desired them to man the windlass, and advised them to give over quarrelling and return to their duty. The same men who had before refused to weigh the anchor did so again, saying that they wanted some money, and wished to go on shore. I told them that I was not going to detain the ship to let them go ashore. They again refused to obey the order, when I told them they had better go to their duty by fair means. \* Owen [ \* 83 ] Williams, Robert Fullarton, William Kendall, and William Thompson, (this is evidently a mistake,) “and others were amongst those who so refused to weigh the anchor, Kendall being the spokesman. I told them that if they would not go to their duty, I must send for assistance from the man-of-war. Owen Williams made answer, “We’ll all enter on board the man-of-war and leave the — in the lurch ;” and Captain Hadden then says, that upon the commander of the man-of-war coming on board, two of the crew, Williams and Fullarton, were taken away as prisoners. At the same time he admits that he gave the commander a statement of the rate of pay of the men and the stores they were possessed of.

Such is the account given by Captain Hadden, the master, of the occurrences which took place on board his vessel after her arrival at St. Helena ; and I must say, that I think it would be impossible, upon this representation, to hold that there has been a forfeiture of the mariner’s entire wages for twenty-two months’ services. Grossly as he may have misconducted himself, and I admit that his behavior was most reprehensible, I cannot consider that his offence (committed in a state of intoxication, and followed as it was by an efficient performance of his duty during the remainder of the voyage) was such as should entail upon him the entire forfeiture of his wages ; and there is one feature in the testimony of Captain Hadden, which I must notice as strongly favorable to the mariner ; namely, the absence of any imputation that he lent himself to use abusive language upon the occasion in question.

The evidence of the mates, and particularly of Mr. Webb, it is

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The Blake. 1 W. Rob.

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[ \* 84 ] true, attributes the use of language \* of a very improper character to William Kendall. On the eleventh article, Mr. Webb states, "that when the crew came on deck, the chief mate told them to man the windlass, upon which Kendall said that he would knock the head off the first — who touched a handspike." It is to be observed, however, at the same time, that this witness directly negatives the statement in the plea, that there was an attempt to interfere by force with the men who were willing to work at the windlass; for he expressly says, "I did not see any attempt made to force the men from the windlass, it was only an interruption and a jeering." Mr. Webb then goes on to depose to the alleged act of violence imputed to the mariner Kendall, in throwing a handspike at William Thompson. He states, "it was not at this time, although it was upon the same day, and after Williams had been taken on board the 'Fair Rosamond,' that I saw Kendall throw a handspike at William Thompson, which struck him on the side of the head and out his ear."

But how does this fact turn out in the evidence? Thompson himself has been examined, and he denies the statement; he says, "that it had nothing to do with the disturbance, that it was a mere accident." Other witnesses have also been examined to the same fact, and with the exception of this single witness, Webb, they directly depose in the negative. Upon the balance of evidence, therefore, I have no hesitation in saying that the conduct attributed to Kendall in this respect, is not substantiated by the evidence in the cause. The last witness I shall refer to (and I am now confining myself to the evidence in behalf of the owners) is Mr. Shepherd, the

[ \* 85 ] chief mate. His evidence is to this effect: — \* the first part of it relates to the conduct of Williams, which it is unnecessary to repeat. With regard to Kendall, he says, "that he was one of the crew who were encouraging Williams at the time; that as soon as Captain Hadden came on deck and ordered the crew to man the windlass and heave up the anchor, Kendall, Williams, Fullarton, and others, all speaking together, said they wanted to go ashore. Captain Hadden told them that they should not go. They then said that they would enter on board the man-of-war, meaning the Fair Rosamond, which was at anchor not far from The Blake. In the mean time, those of the crew and the apprentices who had been from the first willing to obey orders, attempted to heave round the windlass, but they were interrupted by Kendall, Williams, and others of the refractory crew, who tried to pull them from the bars." This last statement, it is to be observed, is spoken to by this witness alone,

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The Blake. 1 W. Rob.

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and is directly negatived by every one of the other witnesses upon the one side and the other, and more particularly by Mr. Shepherd's fellow witness, Webb, in the evidence to which I have already adverted.

With the evidence of this witness, I have now, I believe, gone through all the material facts of the case deposed to by the witnesses who have been produced on behalf of the owners.

It has been suggested by the counsel for the owners, that they had much to lament that her Majesty's ship Fair Rosamond was detained on service in a distant part of the globe, and they were deprived in consequence of testimony which would have confirmed that part of their plea which alleged that Williams and Fullarton were taken as prisoners, and not as volunteers, on board that vessel.

Legally \* speaking, it is impossible that I can rely upon the [ \* 86 ] representation of counsel as to the effect of evidence not taken in the cause; but even assuming that the testimony of the commander and crew of The Fair Rosamond would have borne out the owners' statement upon this point, it would, in my view of it, have had no material bearing upon the question at issue in this case.

I am not considering the conduct of Fullarton or Owen Williams, but the case of William Kendall and Williams and Fullarton might possibly have been taken out of this vessel, because they had been guilty of misconduct. It is perfectly clear from the evidence in the cause, that Kendall was not taken. It is indeed stated by some of the witnesses, (and it seems to be admitted,) that Kendall called out, when they were taking the men away, "Why don't you take me? I am a ringleader too;" but this I conceive was a mere bravado, uttered whilst he was under the influence of intoxication, and showing an anxiety on his part to go on board the man-of-war with his two companions; but it cannot, I think, be taken as an admission that he was guilty of the same degree of misconduct. It is obvious that Captain Hadden, the master, did not consider the safety of his vessel endangered by retaining him on board. If Captain Hadden had believed the safety of his ship to have been exposed to risk by Kendall remaining on board, he would have said to the commander of the man-of-war, "You must take this man also, as he has misconducted himself, and his insubordination is such that the safety of my ship may be hazarded by his continuance on board." Nothing of this kind occurs; he is retained on board The Blake, and the vessel proceeds on her homeward course, \* and within [ \* 87 ] twenty-four hours afterwards the mariner returns to his duty, and conducts himself with propriety during the remainder of the voyage.

Under this state of circumstances I have now to determine whether this is a case in which the entire wages of this mariner, earned in the Indian seas during nearly two years of a seaman's life, are absolutely forfeited? It is no small punishment if the law requires me to pronounce such a sentence, and I think that nothing short of absolute necessity should drive the court to so severe a measure. I do not mean, by any of the observations I have made, to extenuate or excuse the misconduct of which the mariner has been guilty. His conduct has been most culpable, and I should rejoice much if the law gave me the power of mulcting him of a part of his wages as a punishment of his misbehavior; but I have no such power, the law as I have already stated, binds me to pronounce against the whole claim or for the whole claim.

That great insubordination prevailed on board the vessel, is clearly proved. At the same time, it is to be observed, that it was only upon one occasion; when the crew were in a state of inebriety, and when that inebriety had been altogether unchecked by the master and officers on board. The consequence was a gross disobedience of the master's authority, but there was no mutiny, and it is absurd to suppose that a concerted mutiny would have been planned in the presence of a queen's ship stationed within a few yards of the vessel. It is also to be observed, that the occurrence took place in port, where the ship was exposed to no hazard; and I draw a strong line of distinction between disobedience of orders in port, and any in-  
 [ \* 88 ] subordination \* whatever when the vessel is on the high seas, where it might expose to destruction the ship, cargo, and the lives of all on board. Lastly, it is to be observed, that the insubordination in question originated from causes which occurred before Captain Hadden assumed the command of the vessel; and in which the then master set the worst possible example, and destroyed the discipline of the ship.

Under these circumstances, I do not think that I ought to pronounce for the forfeiture of the wages, as prayed for by the owners. I must, therefore, adopt the other alternative, and pronounce for the whole of the mariner's claim, and of course I must give costs, otherwise (as Lord Stowell observed) the judgment of the court will have no effect.

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The City of London. 1 W. Rob.

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THE CITY OF LONDON, Reynolds.

November 5, 1839.

A mariner discharged from a vessel after the articles had been signed, but before the commencement of the voyage, entitled to proceed in the Court of Admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted.

*Seable*, that if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by an action on the case.

THIS was a suit for subtraction of wages brought by a mariner who had been hired to serve as cook on board *The City of London*, on a voyage to New South Wales and the East Indies, and back to England, and was discharged by the master before the commencement of the voyage, two days after the ship's articles had been signed. A summary petition was now brought in on behalf of the mariner, the admission of which was opposed.

Against the admission of the petition, the *Queen's Advocate* argued — That where a voyage had been commenced, and a seaman unduly discharged, the authority of the court might undoubtedly interpose to afford him redress, as in the cases of *Robinett v. The Exeter*, \*2 *Robinson*, p. 261, and *The Beaver*, also reported [ \* 89 ] in the same collection of Reports, vol. iii. p. 92 ; and to this extent might be added the authority of Lord Chief Justice Abbott in his work on Shipping, Part IV. c. 2.

That no case however was on record in which a seaman had been allowed to sue in the Admiralty Court for wages, when he had never entered at all upon the voyage ; and that it clearly appeared, from the authority of Chief Justice Abbott, that where seamen were discharged before the commencement of the voyage, their remedy was not by proceedings in the Court of Admiralty, but by an action on the agreement.

For the mariner, *Addams, contra*, contended — That the meaning of C. J. Abbott, in the passage last cited, was this : that if an agreement is entered into, and afterwards the owner neglects to send the ship on the voyage, the seaman's remedy must be by action on the case ; that a strong distinction existed between such a case and the one before the court. That in this case, moreover, there was one point of material importance that had not been adverted to, namely, the statute of 5 & 6 W. IV., the purport of which act was not only

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The City of London. 1 W. Rob.

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to increase the number of seamen, but to give them due encouragement and protection. That by the sixth section of that act it was enacted to the following effect: "That in case a seaman, after having signed the ship's articles of agreement, shall refuse to proceed to sea, in that case, upon complaint made on oath before the magistrates, such seaman should forfeit not only his pay and clothes on [ \* 90 ] board, but be committed to hard \*labor for thirty days."

That it would be a hardship indeed, when such penalties were enacted against the seaman for a violation of his engagement, if there was no reciprocity on the side of the owners; and if a seaman who had entered into articles should, under this act, be liable to be apprehended and committed to hard labor if he refused to proceed on the voyage, and yet had no remedy, if a master discharged him before the commencement of a voyage, but an action for breach of contract. That the sum claimed in this case, after deducting what the mariner has earned in other vessels, was only 11*l.* 1*s.* 7*d.*, and it would be a great injustice to deprive him of the comparatively speedy remedy the proceedings in this court afforded, and send him for his redress to a more protracted and expensive litigation elsewhere. That with respect to recorded cases, it must be admitted, there was no case on record of a suit precisely in point with the present, but it was well known that suits of this description had been frequently threatened, and had been only prevented by the owners making compensation.

#### JUDGMENT.

DR. LUSHINGTON. In considering the present question, the court can know nothing of the merits of the case; it must form its judgment on the question of law, assuming for the purpose the truth of the facts alleged in the libel now offered to its consideration.

On the part of the owners, it has been contended, upon the facts stated in the summary petition, that I, as judge of the Court of Admiralty, have no jurisdiction in the cause. It is, therefore, [ \* 91 ] necessary that \*I should advert to the facts of the case, in the first instance, before I decide upon the question of law that is thus raised upon them.

Now it appears from the summary petition, that the mariner was hired to serve as cook in this vessel on a voyage to New South Wales, thence to the East Indies, and back again to England. He was, therefore, engaged on a voyage of considerable duration. He goes on board upon the 7th of March. The ship's articles are signed upon the 12th, and on the 14th of March, before the commencement of the intended voyage, the master thinks fit to discharge him. Upon his discharge he obtains employment on board another vessel, and he

now brings his action in this court for the balance between his earnings in the intermediate time, and the amount of wages he would have been entitled to if he had proceeded upon the voyage for which he was originally engaged.

Such is a brief outline of the facts of the case as set forth in the summary petition, and it is abundantly clear to my mind, assuming these facts to be true, that the mariner, in being thus deprived of his employment on board this vessel, has sustained a loss for which he is entitled to a remedy.

In all cases of this description, some loss will generally accrue to the seaman so discharged. The amount of that loss, however, must vary according to circumstances, and in some cases, it is obvious, the loss sustained may be very considerable. For instance, the discharge of the mariner may occur at a season of the year when another engagement cannot be obtained; the consequence of this must be that the seaman must for the time be thrown altogether out of employment. For this, it is clear, he must have a remedy [ \* 92 ] somewhere. The question then is, where this remedy is to be sought.

Now, in the course of the arguments that have been addressed to the court, it has been admitted on the one side, that if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which such seaman has been engaged, he would not be entitled to sue in this court for his redress, but must seek his remedy at common law, by an action on the case. To this position I am disposed to accede, and for this reason: that in such a case there would be nothing to show the real amount of loss sustained. The question would strictly be a question of *quantum meruit*, and if this court was to take upon itself to adjudicate upon the *quantum* of damage sustained, it would be usurping the functions of a jury, to whose consideration the point in question is more peculiarly referable. But again, there is another case in which it has been admitted that the court has jurisdiction, namely, where a seaman has been taken on board, the voyage been prosecuted, and during its progress the seaman has been unduly discharged. In this case, it is acknowledged that the seaman so discharged may seek his remedy in this court; and the court might safely entertain the question, for in such a case there would be a standard by which the loss might be decided.

Now, how does this last case differ from the case before the court? In the one case the seaman might have been discharged at Portsmouth or the Isle of Wight, or the nearest outpost after the commencement of the voyage, and this court would have jurisdiction to



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The Manchester. 1 W. Rob.

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afford him his redress. Does it then make any difference, [ \* 93 ] the vessel going the \* voyage, that he was discharged before the commencement of it? I apprehend not; the amount of damage is to be adjudicated upon the same principle in both cases, and I can see no solid distinction between them, or any reason why I should send this seaman to a court of common law. For these reasons, it appears to me, that I am bound to admit the summary petition.

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THE MANCHESTER, Macleod.

November 5, 1839.

In a proceeding by plea and proof, a libel having been admitted on behalf of the promoters of the suit, the responsive allegation of the owners of the vessel proceeded against directed to stand over till the personal answers of those owners had been given in. The owners being resident in Ireland, the decree for their answers to issue in the usual form, and not by letters of request.

THIS was a case of collision, in which the vessel proceeded against had been arrested, but the owners, it appeared, were resident in Ireland, out of the jurisdiction of the court.

The proceedings being instituted by plea and proof, instead of in the more usual form by act on petition and affidavits, a libel was given in and admitted on behalf of the promoters of the suit, and a decree was prayed against the owners of The Manchester, for the purpose of taking their personal answers. This decree, however, never issued from the registry, in consequence of a difficulty being felt by the registrar as to the form in which it should go forth; whether in the usual form, or by letters of request.

A responsive allegation was now offered on behalf of the owners of The Manchester, and its admission was opposed by the *Queen's Advocate* and *Addams*, on the part of the promoters, until the owners' answers had been given in.

*Nicholl, contra*, in support of its admission, submitted — That by the usual practice of the court, when a libel was admitted, [ \* 94 ] the adverse party was entitled to \* give in his responsive allegation, whether the answers were returned or not. That this was the usual course adopted by the court in its proceedings; and that in the present case more especially, no hardship or inconvenience could be sustained in adhering to this practice; inas-

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The Maria. 1 W. Rob.

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much as an appearance was originally given by the owners, upon the express understanding that the question in the cause was to be strictly confined to a question of law, and that the facts of the case should not be gone into.

PER CURIAM. The court can take no notice of any understanding asserted to have been made between the parties out of court, but with respect to what has been urged by the counsel for the owners, it may be true, that in ordinary cases a party has been permitted to give in his responsive allegation immediately the libel has been admitted. By the strict rule of practice, however, the answers to the libel should be given in before the responsive allegation is admitted; the question therefore is, whether the court can depart from this rule in the present instance, without the consent of both parties in the cause. I doubt if I could do so in any such case; and there is in the case under consideration this material distinction, that the owners are resident in Ireland, out of the jurisdiction of the court. The court, therefore, can exercise no direct control over them, and if they decline to give in the answers required, and the allegation is admitted without them, the promoters of the present suit may suffer injustice in being thus deprived of what may possibly be of great importance to their case. I shall direct a decree to issue, not by letters of request, of which \* there is no precedent, but in the usual [ \* 95 ] form, and the allegation must stand over till the answers of the owners are given in.<sup>1</sup>

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THE MARIA, Witt.<sup>2</sup>

November 13, 1839.

The owners of a foreign vessel proceeding up the river Tyne, with a duly licensed pilot on board, under the provisions of the Newcastle Pilot Act, held not to be responsible for damage occasioned by the default of such pilot.<sup>3</sup>

Construction of the act 41 Geo. III. c. 86. Under sixth section, compulsory upon masters of foreign ships to take a pilot on board.

Effect of such compulsion, that independent of the act 5 Geo. IV. c. 55, upon general principles the owners are not responsible.

THIS was a cause of damage by collision, promoted by the owners

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<sup>1</sup> The case came on for final hearing upon the 7th of July, 1840, when the court pronounced for the claim of The Concord, with the costs.

<sup>2</sup> [See The Agricola, 2 W. Rob. 10.]

<sup>3</sup> [As to the responsibility in cases of *foreign* vessels in charge of a pilot, see The Girolamo, 3 Hagg. Adm. R. 169; The Gladiator, Id. 340; The Eolides, Id. 367; The Baron Holburg, Id. 214.]

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The Maria. I W. Rob.

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of The Websters, a British vessel, against the Prussian ship The Maria.

The act on petition on behalf of The Websters set forth, " That on the 11th of May last, the schooner The Websters was on her return voyage to Newcastle-upon-Tyne, laden with a cargo of peas ; that in the forenoon of the said day, when about half flood, the said schooner was got under weigh to proceed up the river Tyne; that the tide being weak, and it being nearly a calm, with the wind light from the eastward, the schooner's boat with two hands on board was attached by a rope ahead, in order by rowing to assist the said schooner in her progress up the said river; that in rounding Bell Point, a brig or snow (which afterwards proved to be the foreign ship Maria, the vessel proceeded against) was observed in tow of a steamboat or tug coming up rapidly astern of the said schooner; and, at the same time, another vessel, also in tow of a steam-tug, was observed coming down the river ahead; that the said schooner being in a proper situation or fair way, it was not necessary that she should, nor did she alter her position; that George Chapman, the master of the

[ \* 96 ] said schooner, hailed The Maria, and told the \* persons on board her to ease the steamboat and not tow into the said schooner; that when the said schooner had reached opposite Bell Point, which is situated about five miles up the said river, the said brig Maria, notwithstanding she was repeatedly hailed to ease the steam of her tug, came into collision with her, and ran into the starboard main-chains, and thereby did the said schooner considerable damage; that at the time of the collision the schooner was in charge of a branch river pilot on the said river Tyne; that every precaution was used in keeping the said schooner in a proper situation; that there was sufficient room for the said tug to have passed the said schooner, if sufficient precaution had been used; and that the collision in question was solely owing to the mismanagement or neglect of those on board the said brig, and not through any fault of those on board the schooner."

The reply on the part of The Maria, denied that the accident was occasioned by the mismanagement of those on board her; on the contrary, it alleged, " That at the time the brig Maria came up with The Websters, a large ship, called The Grafton, was observed coming down the river, the schooner Websters being at such time on the larboard bow of the brig; that the aforesaid ship, The Grafton, was coming direct towards the schooner and brig, and that her helm was ported in order to go to the southward of The Websters, but that she did not answer her port helm, in consequence of which she ran foul of The Websters, and that by the violence of the blow, the schooner was forced to the northward, and driven with her starboard side

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The Maria. 1 W. Rob.

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across the bows of the said brig Maria, and that such collision arose entirely from the said bark Grafton not answering her helm, and that the damage complained of in this cause was occasioned thereby," &c., &c.

It was also further set forth on the part of The Maria, that the brig Maria was a foreign vessel, and at the time of the collision was under the charge of a duly licensed pilot, taken on board under the provisions of the Newcastle Pilot Act, 41 Geo. III. c. 86, s. 6, and that in virtue of that act, as also of the general act, 6 Geo. IV. c. 125, s. 56, even if the damage had been occasioned by her, as alleged, the owners were not responsible in this cause.

The cause was argued on a former court day by the *Queen's Advocate* on behalf of the owners of The Websters, who submitted — That in point of law, under the circumstances of the case, the owners of The Maria were not exonerated on the ground of a pilot being on board at the time of the collision, because it was not compulsory upon the master to take such pilot on board. That upon this ground alone had the exemptions in other cases been allowed. That in the case reported in the third volume of Price's Reports, the Attorney-General *v.* Case, which was a case under the provisions of the Liverpool Act, an act similar in its operation to the Newcastle Act now relied on, the exemption of the owners was overruled upon this very point; namely, "That although a pilot was on board at the time, it was not compulsory upon the master to have taken such a pilot on board," and upon the merits of the case he also submitted that the Maria was in fault, and consequently that the owners were responsible.

*Phillimore, contra*, contended on behalf of the Maria — \* That with respect to the merits of the case, the accident [ \* 98 ] was not the fault of The Maria, but of The Grafton, which had driven against The Websters and forced her across the bows of The Maria, as pleaded in the reply to the act on petition; and with respect to the law of the case, he submitted that under the provision of the Newcastle Act, 41 Geo. III. c. 86, a compulsory obligation was imposed upon the master to take the pilot on board, and that consequently by the 55th section of the 6th Geo. IV., and also upon the authority of the case decided in *Carruthers v. Sidebottom*, his parties were entitled to be dismissed with costs.

#### JUDGMENT.

DR. LUSHINGTON. I am exceedingly glad that I have taken time to deliberate before I gave my opinion in this cause. The result of that

deliberation has been to induce me to investigate with great care the cases that have been cited in the arguments of the learned counsel, and I hope that some considerable light has been thrown upon my mind with respect to the present question in consequence of that investigation.

The facts of the case lie in a narrow compass.

The collision took place when the two vessels The Maria and The Websters were proceeding up the river Tyne. The action is brought against The Maria, and it is alleged that the collision was occasioned by the neglect, misconduct, or want of seamanship of the persons on board that vessel. I should also state, that The Maria was in tow of a steam-vessel at the time, and that The Websters was proceeding by the assistance of her own boat to ascend the river to the port of her destination.

[ \* 99 ] The defence set up on the part of The Maria is \* twofold.

They do not deny the fact of the collision, or impute blame to the persons on board The Websters; but it is contended, first, that The Maria is a foreign vessel having a pilot on board in compliance with the local acts; and secondly, that the accident was occasioned by another vessel, The Grafton, which in coming down the river struck the larboard side of The Websters, and drove that vessel with her larboard side across the bows of The Maria.

The question, therefore, is a mixed question of law and of fact. In delivering my judgment, I shall first address myself to the question of law, and afterwards to the consideration of the facts which it may be necessary to dispose of in this case.

With respect to the law of the case, the first question is, whether The Maria, if the responsibility would otherwise fall upon her, can successfully plead, in exemption of the owners' liability, that she had a pilot on board, and if she can so successfully plead, another question might then arise whether the collision occurred in consequence of the want of skill or negligence of that pilot.

Now the leading principle of the legislature in exonerating owners from any damage occasioned by their vessels having pilots on board, is this; that the masters are compellable to take such pilots on board, and the owners are not responsible for the acts of persons to whom they are thus forced to commit the management of their property, and over whom they have no control. This, I apprehend, is a rule founded on a great principle of justice and equity. It is a rule also supported by the authority of the case which has been cited, I mean

the case of *The Attorney-General v. Case*, reported in the [ \* 100 ] third \* volume of Price's Reports, which it will be necessary to examine with much particularity. Now in the case

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The Maria. 1 W. Rob.

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referred to, the vessel doing the damage and held responsible was *The Columbus*; she was lying at anchor in the river Mersey, when she dragged her anchor and fell foul of *The Bittern*, a king's ship, and occasioned the damage in the collision.

In that case the opinion of the Court of Exchequer, pronounced by the very learned Chief Baron Thompson, was to this effect:— That the General Pilot Act, (52 Geo. III. c. 39,) had no general operation over all the pilots duly licensed throughout the kingdom, but was confined, unless where otherwise particularly expressed, to the pilots specially enumerated in the act itself; that therefore it did not extend generally to pilots licensed under the Liverpool Act, (37 Geo. III. c. 78,) and that the question whether the taking of a pilot was compulsory or not, must depend upon the construction of the Liverpool Act alone. It was also further decided in that case, that the Liverpool Act did not, under the circumstances of the case, render it compulsory upon the master to take the pilot.

*The Columbus* was lying at anchor in the river Mersey; this is an important particular to be noticed. By the 31st and 34th sections of the Liverpool Act, it is provided, that any vessel whilst lying at anchor may require a pilot to remain on board, upon payment of five shillings per day for his services. It was purely optional, therefore, to have a pilot on board or not. What follows upon this? — “ That the owners of *The Columbus* were liable to the damage, because the master, in electing to take the pilot on board, took him as the servant of the owners; and by the general law owners are responsible for the ‘acts of their agents.’ There is a confusion in [ \* 101 ] the report of that case which has raised much difficulty, and the report cannot be reconciled with the decision that was given upon that occasion. The ground upon which it was decided was as I have already stated; but it never was decided that a clause requiring a pilot to be taken on board, or if not taken, the pilotage to be paid, was not compulsory.

The words of the learned judge in delivering the opinion of the court were these: “ There is nothing here compulsory upon the master or owner to take on board a pilot whilst he is riding at anchor in the river Mersey. It is optional in him whether he will do so or not; but if he chooses to do so, he is to pay the pilot at the rate of five shillings for every day he shall attend, and no more. His obligation to take a pilot (even if the act of the 37th is to be taken as connected with the act of the 52d G. III.) is only on his proceeding to sea and refusing to take on board a pilot so licensed. There is no penalty for not taking on board a pilot whilst lying in the river Mersey, but he is entitled, if he thinks fit, to command the services of a pilot whilst so

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The Maria. 1 W. Rob.

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lying at anchor, paying him at the rate here specified; and it is for that accommodation that he is to pay the five shillings if he refuses to take him on board, upon the vessel proceeding to sea." The learned judge then went on to say: "He was not compelled at the time in any way, either under the penalty of double wages or of paying even the single wages, to have any pilot on board; it was his own act to have him, and it can be only in the case of such an officer having been forced upon him without his own election that the responsibility of the owner can possibly be discharged."

[\*102] \*It is, therefore, quite clear to my mind, that the case to which I have just adverted, was rightly decided; and it is also equally clear, that it was decided simply upon the ground that when a pilot is taken on board, and it is optional for the master to have that pilot or not, the owners are responsible for his acts. But no decision was given as to what was or was not a compulsory necessity.

A question very similar was again raised in the case of *Carruthers v. Sidebottom*.<sup>1</sup> This case, I find in the last edition of Lord Tenterden's book on Shipping, was argued and determined in the Court of King's Bench in the interval between the argument and judgment in the *Exchequer*. The question in *Carruthers v. Sidebottom* was upon a policy of assurance, whether the assured could recover upon the policy for the amount of certain goods which had been damaged by the stranding of the vessel through the mismanagement of a pilot on board duly licensed under the Liverpool Act.

The circumstances of the two cases, therefore, were different, but the principle to be decided was the same in both; and in arguing the case in *Carruthers v. Sidebottom*, it was much discussed whether a necessity was imposed upon the master or owner to take a pilot on board under the provisions of the Liverpool Act in conjunction with the general act. In the judgment of the court this point was decided in the affirmative, and the court held that the general act did operate upon the Liverpool Act, and that by virtue of such general act the taking on board the pilot was compulsory. It is observed

[\*103] by Lord Tenterden, in the last edition of his work \*on Shipping, that the two cases are not easily reconcilable with each other in all that was said by the learned judges, and the learned lord then proceeds to remark with reference to those decisions: "It may be inferred from the two cases considered together, that where the master is bound by act of parliament under a penalty

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<sup>1</sup> 4 Maule & Selwyn, 77.

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to place his ship in the charge of a pilot, and he does so in compliance with the provisions of such act, the ship is not to be considered as under the management of the owners or their servants, but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners. To what extent and under what particular circumstances the master is thus bound to place his vessel under the charge of a Liverpool pilot may, in many cases at least, be considered as undecided." Now is it necessary for me to decide between the conflicting opinions of such high authorities as the Court of King's Bench, and the Court of Exchequer? And if it were necessary so to do, is there any express distinction between the statutes 52 G. III. and 6 G. IV.?

Some slight difference undoubtedly there is in the wording of the statutes in question, but I can find no material distinction in their effect. In forming my opinion in the present instance, my judgment must be founded upon the statute 6 G. IV., and especially upon the 55th section on that statute.

Now the 55th section provides in the following terms: "That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, for or by reason or means of any neglect, \* de- [\* 104 ] fault, incompetency, or incapacity of any licensed pilot acting in charge of any such ship or vessel under or in pursuance of any of the provisions of this act." Then the question, if I have to decide it at all, is this: whether or no the pilot in this case was duly licensed and acting in charge under the provisions of the act? And this is a point of very considerable difficulty to be determined.

If I look to the 6th section of the act in question, I find "it shall be lawful for the Corporation of the Trinity Houses of Hull and Newcastle," the one we are now considering, "to appoint sub-commissioners to examine pilots, and give licenses to them to pilot ships and vessels into or out of any ports, harbors, or places within the limits of their jurisdiction." Is any authority here given to the Corporation of the Trinity Houses of Hull and Newcastle to grant licenses, rendering a pilot so licensed a licensed pilot under the general provisions of the act?

Again, the 89th section likewise provides that the act shall not "extend to ports in relation to which particular provision shall have been made in any particular act or acts of parliament, to the pilots or pilotage, or the pilotage within the limits prescribed by any act or acts of parliament relating to pilotage for such ports." Upon these two sections of the act, then, I doubt very much whether I could with



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propriety apply the 55th section of the general act of 6 G. IV. to the case of a Newcastle pilot appointed under the circumstances of this case. But it is necessary for me to determine this point upon the present occasion, for reasons to which I will presently advert; and I gladly forbear to take upon myself unnecessarily the difficult task of deciding upon the conflicting opinions in the cases of *The Attorney-General v. Case*, and *Carruthers v. Sidebottom*, to which I have already referred.

I must now, however, take another view of *Carruthers v. Sidebottom*, which bears very strongly upon the question I have to decide, and observe the difference between the circumstances of that case and the case of *The Attorney-General v. Case*. In the case of *The Attorney-General v. Case*, *The Columbus*, the vessel proceeded against, was lying at anchor. In *Carruthers v. Sidebottom*, *The Alexander* was proceeding up the river homeward bound, with a pilot on board.

Now the Liverpool Act provides for the three following cases:—

1st, The case of vessels homeward bound; 2d, of vessels outward bound; and lastly, of vessels lying at anchor; and with reference to homeward bound vessels, it is provided, in the 24th section of the act, that, if the master refuses to take a pilot on board, he is liable to the payment of pilotage. There is, therefore, this distinction in the two cases, that, in the case of a vessel at anchor, the taking a pilot on board is perfectly optional with the master; but in the case of a homeward bound vessel, it is enjoined upon him by the provisions of the act, and if he refuses so to do he is rendered liable to the payment of the pilotage dues. This, in my opinion, amounts to a compulsion to take such pilot on board, and it was so held by the learned judges by whom the case of *Carruthers v. Sidebottom* was decided. What says Mr. Justice Le Blanc? He says, “it appears that the master was compellable by law to take on board a pilot, and it was in consequence of his misconduct that the vessel was placed [\* 106] in such a situation that when the water left her she fell upon her side, and thus the damage happened.”

Without going further into the case, it is sufficient to observe that Lord Ellenborough and Mr. Justice Bayley were of the same opinion, that the master was compelled to take a pilot on board. But it may be said, that admitting, in the case of *The Alexander*, that the taking a pilot was compulsory, does it therefore follow that the owners would be exempted from the damage done by their vessel, unless the 30th section of 52 Geo. III., or, as in this case, the 55th section of 6 Geo. IV., applies to give the indemnity?

Now I am of opinion that, independently of the express provisions

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in those statutes, the compulsory taking of a pilot does, upon general principles, relieve the owner from all responsibility for his acts. Observe the expression of Mr. Justice Le Blanc, "Independently of the general principle, the Pilot Act provides," &c. Although, therefore, his judgment was founded upon the opinion that the 55th section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognized the general principle, and this principle is one that is recognized by common sense and justice all over the world. Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for this reason: upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails.

\* These are nearly the words in which Lord Chief Justice [\*107] Eyre laid down the principle of law respecting the responsibility of owners. If it were necessary to trace the principle further, I might refer to the case of *Nicholson v. Mounsey*, reported in 3 East; but it is not necessary to go into the consideration of that case. I may here, however, notice that it has been said that a contrary doctrine has been laid down by Chief Justice Mansfield, in the case of *Nordstrum v. Boucher*<sup>1</sup>; but on looking to the report, it is evident that the doctrine said to have been delivered by Chief Justice Mansfield applied to a very different case. Then what is the result, upon my mind, of the two important cases to which I have so fully adverted, leaving out of consideration the question of the general operation of the Pilot Act, and its applicability to pilots appointed by local authorities? It is this,—I think both cases were rightly decided,—the case of the *Attorney-General v. Case*, because there was no compulsion to take a pilot; that of *Carruthers v. Sidebottom*, because the taking a pilot was compulsory, and the insurers were only liable upon that ground, and not otherwise. After this long, but, as I conceive, necessary preliminary examination of the cases and principles on which they were decided, I now come to the present case, and I shall apply the principles I have laid down to it.

If the taking a pilot on board was compulsory, and the collision was occasioned by the fault of that pilot, I shall hold the owners of *The Maria* exempt from responsibility, upon general principle, without reference to acts of parliament, for in that case the pilot

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<sup>1</sup> 1 Taunton's Rep.

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[ \*108 ] \* was not their servant, and the maxim *qui facit per alium facit per se*, does not apply. If, on the contrary, the taking a pilot was voluntary, then he was the servant of the owners, and the owners are responsible, unless the General Pilot Act, which takes away responsibility, applies to a foreign vessel so circumstanced, and to cases where it is optional to take a pilot or not.

Now The Maria was a foreign vessel. How came she, then, to take a pilot, and what obligation was there upon her so to do? For the purpose of ascertaining this point, I must look to the words of the Newcastle Act, which compel vessels proceeding up the Tyne to take a pilot on board, and, in the 6th section of that act, I find, "That the owners or masters of any foreign ships or vessels resorting to or coming into, or departing from, the said port of Newcastle, or any of the creeks or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board, and employ in the piloting and conducting such their ships or vessels, such pilots licensed as aforesaid; and in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master, pilots, and seamen, the aforesaid pilotage duties." Now, does the section in question impose any compulsory duty and necessity upon the owner or master to take a pilot on board? I am most clearly of opinion that the section referred to is compulsory. If it had been enacted simply that a pilot should be taken, without providing that, in case a pilot was not taken, the pilotage should be paid, the master would clearly have been liable to be indicted for a misdemeanor in refusing

[ \*109 ] to take him, for every \* breach of an act of parliament within British jurisdiction, is an indictable offence, whether committed by a foreigner or not.

But assuming that all criminal proceedings are done away with by the clause enacting the pilotage to be paid, is it less compulsory upon the master to have such pilot on board? It was so urged in the argument of counsel, upon the supposition that such argument had prevailed in the case of the Attorney-General v. Case; but I have shown that there is a mistake in the report of that case, and that the case itself is no authority for any such position. I have also further shown, that in the case of Carruthers v. Sidebottom, much weaker words were considered compulsory. In the Liverpool Act, there are no such words as obliged and required, but simply, that if no pilot is taken, the pilotage shall be paid. But, independent of authorities, look at the words of the act themselves, "obliged," and "required," they are compulsory *per se*. But is not making the neglect to take a pilot punishable with payment of the pilotage also a compulsion upon

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the owners? Suppose the statute had mentioned ten times the amount of the pilotage, where would be the difference? It would only be in the degree of the compulsion, but not in the compulsion itself. I have, therefore, no hesitation in saying, that this pilot so taken on board, in obedience to the act of parliament, was taken by compulsion, and if by compulsion, the owners are not responsible for his acts. Then what is the true description of the facts of this case? The owners of *The Websters* charge generally, that the collision took place from the fault of those on board *The Maria*. Now the fault, if fault there was, consisted either in proceeding to the northward of *The Websters* or in not slackening the speed of *The* [ \* 110 ] *Maria* by casting off the tow rope or easing it. If the fault lay in proceeding to the northward, it was the fault of the pilot, and the owners are not responsible. If, on the other hand, the fault consisted in the not slackening *The Maria's* course, upon whom does the blame attach? Not upon the master, for the conduct of the vessel was with the pilot; and it would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law and specific enactments, from liability for the acts of the pilot, would be most severely prejudiced. If no order was given to ease the steamer, the fault was in the pilot, not in the master; the owner, therefore, in this view of the case, would not be responsible.

It is needless to prosecute the inquiry further to the case of the steamer itself, for it is not alleged, and could not be imagined, that the steamer would not fulfil the orders of the pilot; and there is no proof of any disobedience on the part of the seamen on board the steamer. With respect to *The Grafton*, I see no occasion to consider whether the accident did or did not arise from the fault of the persons on board her; for if it did, there can be no dispute that *The Maria* is not responsible.

Assuming, therefore, that the accident was occasioned by *The Maria*, I am of opinion that, under the circumstances of this case, it was the fault of the pilot who was taken by compulsion, and that the owners are consequently not liable.

\* The opinion I have thus formed in this case is founded [ \* 111 ] upon the general principles of reason and justice; that no one should be chargeable with the acts of another who is not an agent of his own election and choice; and I further think, that it would be contrary to all sense of equity, to say to the owners of a foreign ves-

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sel, " You shall take a pilot of our selection, of our appointment; be he drunk or sober, negligent or careful, skilful or ignorant, you shall be responsible for his conduct, unless you choose to submit to the penalty, and penalty it is, of paying the pilotage for nothing."

I therefore dismiss the owners of The Maria from the present suit, but without costs.

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### THE ALINE, Stockebye.

December 3, 1839.

The successful suitor in a cause of damage has a lien upon the property condemned, to the full extent of the owner's interest in the vessel.

His lien is paramount to the claim of a mortgagee or bondholder prior to the period when the damage is done.

Also extends, in case of a deficiency of proceeds, to subsequent accretions in the value of the ship arising from repairs effected at the expense of the owner.

*Aliter*, where money has been advanced and repairs effected by a stranger, and a bottomry bond has been *bonâ fide* given for the amount of such repairs.

*Semble*, in such case the subsequent bondholder would have a lien upon the proceeds to the extent of the increased value of the vessel arising from the repairs.

*Semble*: the Court of Admiralty has jurisdiction where a bond has been granted, and the ship has never put to sea.<sup>1</sup>

Also, where a mere agreement for a bond has been entered into, but no bond actually given.<sup>2</sup> Before the court will direct freight to be brought in, it must be satisfied that freight has actually been received.

THIS was a question as to the validity of an agreement for a bond of bottomry made by the master under the following circumstances:

The act on petition on behalf of the bondholder set forth—That the schooner, The Aline, came into Cowes in a damaged state on the 23d of September, 1838, and that application was immediately made by the master to a Mr. Day, a merchant of that port, to assist him in procuring the necessary repairs; that Mr. Day declined to furnish the requisite assistance, unless the master should execute a bottomry bond for such sums as might be expended; that the master agreed to execute a bond of bottomry, and upon the faith of such agreement,

Mr. Day gave directions for the repairs, which were forth-  
[ \* 112 ] with commenced, and were completed on the 20th of \*October following, prior to the arrest of the vessel, and without any knowledge on the part of Mr. Day of any intention to proceed

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<sup>1</sup> [See *Pope v. Nickerson*, 3 Story, R. 465.]    <sup>2</sup> [The *Grecia*, 7 Notes of Cases, 410.]

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against the said ship for damage or otherwise ; that Mr. Day had paid or made himself responsible for the sum of 254*l.* 2*s.* 8*d.*, and upwards, expended in the repairs aforesaid.

In the reply to the act it was alleged, that in the month of October, 1838, the vessel was arrested in a cause of collision, at the suit of the sole owner of The Panther ; that the usual proceedings were had, and on the 31st of January, 1839, the cause came on for hearing, and the court, assisted by Trinity Masters, pronounced that the collision was occasioned through the fault of the master and crew of The Aline, and condemned that vessel, her tackle, &c., in the amount of the damage and of the costs. That the registrar had reported the sum of 220*l.* 13*s.* 10*d.*, besides further interest from March last, and the proctor's bill, not then taxed, to be due to the owner of The Panther. That the vessel had been sold under the decree of the court, and the proceeds, amounting to the sum of 208*l.* 4*s.* 9*d.*, had been paid into the registry. That Mr. Day did not give directions for the repairs, and the same were not completed prior to the arrest of the ship, and without any knowledge on the part of Mr. Day of any intention to proceed against the said ship. That upon the 1st of October, 1838, a formal demand was made upon the master of The Aline for the damage occasioned to the owner of The Panther, which demand the master peremptorily refused to admit ; that the repairs were only partially effected at the time of the arrest, and afterwards completed whilst the vessel was in possession of the officer of the court ; and that Mr. Day advanced the money, \* or [ \* 113 ] made himself responsible with a full knowledge of all the circumstances of the case. That at the time of the collision The Aline was on her voyage from Revel to Oporto with a valuable cargo of flax, and consequently a great part of the voyage was completed, and a considerable portion of the freight earned. That before the vessel was sold, Mr. Day entered into an arrangement with Messrs. Lubbock & Co., of London, the agents of the consignees of the cargo, for the transshipment of the cargo ; and that it was stipulated that he should receive the whole of the freight from Revel to Oporto on delivery of the said cargo at Oporto. That as the proceeds of the sale of the ship were not sufficient to pay the amount of damage, as reported by the registrar to be due, the owner of The Panther was entitled to the freight earned *pro rata itineris*, and that Mr. Day should be directed to bring in an account of the freight *pro rata* on oath, and pay the same into the registry of the court.

The rejoinder of Mr. Day denied that he made himself responsible with a full knowledge of the circumstances of the case, and stated

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that the only repairs which were done to the ship after the arrest did not exceed the sum of 10*l*. That if any formal demand was made, as stated, upon the master, it was wholly unknown to Mr. Day. That Mr. Day had not received or agreed for the whole of the freight from Revel to Oporto, but only for the use and hire of his own vessel in transporting the cargo from this country to the original port of destination.

The cause was argued by *Addams*, for the bondholder.

The *Queen's Advocate*, *contra*.

[ \*114 ]      \* JUDGMENT.

DR. LUSHINGTON. In delivering my judgment in this case, I shall first endeavor to ascertain the true state of the facts as they are disclosed in the proceedings, before I enter upon any question of law that may ultimately arise. The greater part of the history of the case is undisputed in the present instance.

It appears that, during the night of the 22d of September, 1838, a collision took place off Beachy Head, between The Aline, a Russian schooner, going down the channel, and the British brig, The Panther, proceeding up channel on a voyage from Gallipoli to St. Petersburg. Both vessels were much injured by the accident, and The Panther went into Newhaven, and The Aline put into Cowes, for the purpose of repairing the damage they had respectively sustained.

Upon the 20th of October, 1838, The Aline was arrested in a suit of damage, at the instance of the owner of The Panther, and upon the 31st January last, this court, assisted by Trinity Masters, pronounced The Aline to have been in fault, and condemned that vessel in the expenses of the damage she had occasioned.

The amount of the damage not being paid, The Aline was sold under the process of the court, and the proceeds were brought into the registry; and it further appears, that the proceeds so brought in are insufficient to discharge the amount of the damage reported by the registrar and merchants to be due to the owner of The Panther. These are the admitted facts in the case.

Mr. Day has now intervened in the cause; and a claim is preferred on his behalf against the proceeds remaining in the registry [ \*115 ] of the court. The averment of Mr. Day is, that having no intimation of any intended proceedings by the owner of The Panther, he made himself responsible for the repairs of The Aline; and that he did so upon the promise of a bottomry bond to

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be executed in his favor by the master, the vessel being a foreign vessel, and the owner having no agent or correspondent in this country. Mr. Day also further states, that the repairs were completed before the arrest of the vessel took place.

The averment of these facts is supported on the one hand by the affidavit of Mr. Day himself, and is confirmed by the testimony of the master of The Aline. On the other hand, it is denied by the owner of The Panther, that Mr. Day was not apprised of the intended proceedings, and it is also asserted that the repairs of the vessel were not completed until after the warrant of arrest had been executed.

These are the disputed facts in the case; and in considering the statements thus made on the one side and the other, I must observe, in the first place, that there is no evidence before me of any notice having been directly given of the intended proceedings to Mr. Day himself; it is not even alleged in the act on petition that any such notice was given. It is merely stated in one of the affidavits, (which was not sworn till the 5th of November last,) that a formal demand was made upon the master on the 1st of October on behalf of the owner of The Panther, and also by the agent for Lloyd's in the presence of a clerk of Mr. Day. Now assuming that the demand was made as stated in the presence of the clerk, I do not think that such constructive notice is a notice given to Mr. Day himself. Mr. \*Day swears in his affidavit, that he was unap- [ \*116 ] prised of the intended proceedings, and I cannot hold him to be perjured upon a statement thus introduced on the other side, and which Mr. Day had no opportunity of contradicting. As a matter of fact, therefore, I must conclude that Mr. Day had no notice of the intended proceedings at the time he made himself responsible for the repairs of this vessel; and I am borne out in this conclusion by the consideration, that it is highly improbable that Mr. Day would have so made himself responsible upon the security of a bottomry bond if he had expected that the vessel would have been arrested. Upon the second part of Mr. Day's averment, that the repairs were completed before the vessel was arrested, I think it is clearly established, that all but a small portion were furnished before the warrant of the court was executed. With respect to that portion, the question rests upon a different foundation.

Having thus disposed of the facts of the case, I must next consider what is the character of the respective claimants in the cause. The owner of The Panther claims, under the decree of the court, to be indemnified for the loss which he has suffered, out of the proceeds of the vessel by which that loss was occasioned.

The claim of Mr. Day rests upon his agreement with the master



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of the vessel to execute a bond in his favor under circumstances where a bond might fairly and lawfully be taken. In explicating the difficulty which arises from the nature of the respective claims thus set up, I must first inquire, what are the rights of a person in possession of a decree of this court in a cause of damage by collision?

[ \* 117 ] Now independent of any municipal regulation, \* it is, I apprehend, one of the great principles of justice, that in cases of this description, where the wrong is done by the servants of the owner, the owner ought to make good the whole loss occasioned by their default. In the courts of common law, where the proceedings are *in personam*, the operation of this principle would be carried out in its fullest extent, unless restrained by act of parliament.

In these courts, however, where the proceedings are *in rem*, (a mode of remedy not originally given as the measure of the damage, but as the best security for indemnity that could be obtained, as the owner might be beyond the reach of the law,) the application of this principle has been modified by municipal regulation, and a restriction is imposed limiting the liability of the owner of the ship doing the damage, to the value of the vessel itself and of the freight, where the freight can be attached. Under this modification, therefore, the rights of a person in possession of a decree of this court in a cause of damage, are coextensive with the rights of the owner in the vessel against which the decree has been awarded. As far as these extend, all the rights of the owner of the damaging ship are clearly a part of the fund to satisfy the successful suitor.

Are there any other rights, then, that may attach upon a ship doing the damage which would entitle the parties possessing such rights to a preferable consideration?

In pursuing this inquiry, I have carefully examined all the cases which are reported, but I have been unable to find any one that is in point with the present case. I must, therefore, have recourse to principle and reason, and looking to the period when the damage [ \* 118 ] is done, I must consider the claims \* which may accrue before that time, and those which may come into existence afterwards.

Now leaving out of the investigation mariners' wages and prior salvage, to which a different consideration applies, there are, I think, only two descriptions of claim which it is necessary for me to examine in the present instance; namely, mortgage, and bonds of bottomry.

In both of these cases, I apprehend that the mortgagee and the bondholder cannot take any right greater than the owner could confer; namely, a lien on the ship as a security against the owner and

all who claim under him. I am also of opinion, that neither the mortgagee or bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason, that the mortgage or bottomry bond might, and often does, extend to the whole value of the ship; if, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where (as in this case) the damage is done by a foreigner, and the only redress is by a proceeding against the ship. Another reason that would incline the preponderance in favor of the person suffering the damage arises from the consideration, that he has no option, no caution to exercise; the creditor on mortgage or bottomry has. He may consider all the possible risks, and advance his money or not as he may think most advisable for his own interest. He has an alternative; the suitor in a cause of damage has none. In the case of the bottomry creditor, moreover, the risk that is incurred of losing his security is covered by the amount of the premium he is entitled to demand.

\* As, therefore, against a mortgagee or bondholder prior [ \* 119 ] to the period when the damage is done, I think that the successful suitor in a cause of damage has a preferable claim to be indemnified.

Having arrived at this conclusion upon this point, I proceed to examine in the next place, whether a bottomry bond *bonâ fide* granted for the purpose of repairing the vessel after the damage has been done, is subject to the same considerations.

Now in my view of the question, it does appear to me, that great inconvenience would arise to the interest of commerce, if it was to be held universally, that all subsequent bonds so granted must give place to the prior claim of the successful suitor in a cause of damage.

In the case before me, for example, suppose that this vessel, instead of putting into Cowes, had gone to Havre; that she had been there repaired at the expense of a French merchant, and a bottomry bond had been given for the amount of the repairs. What would be the effect of denying universally, the validity of a bottomry bond so given? Why, a very serious impediment would be thrown in the way of all bottomry transactions. The lender, at the time the application is made to him for the advances, could not possibly tell whether the vessel in distress had committed damage or not. He would, therefore, have to calculate not merely future contingencies, but to inquire into all past transactions connected with the vessel. The necessary consequence would be a material increase in the amount of the premium.

Again, with regard to the case of the person who has received the

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damage, is not his interest benefited by the vessel being [ \* 120 ] repaired and enabled to proceed to her port of destination ?

Is he injured in the amount of his indemnity fund ? Not at all. His interest, I have already stated, is coextensive with the rights possessed by the owner of the vessel at the time when the damage is done, and his claim is paramount to the extent of her value at that period. With respect to any subsequent accretion in the value of the vessel, arising from repairs done after the period when the damage was occasioned, his claim to participate in the benefit of such increase of value, must depend upon the consideration how that increase arises, and to whom it in equity belongs. Against the owner who repairs his vessel at his own expense, the claim of the successful suitor would extend to the full amount of his loss against the ship and the subsequent repairs. Where, however, the repairs have been effected by a stranger upon the security of a bond of bottomry, the case is altogether different; and I cannot hold that universally bonds so granted must give way to prior claims of damage.

If I am so far right in my conclusion, how do these principles apply to the present case ? It has been urged by the counsel for The Panther, that the claim of Mr. Day rests upon a mere agreement with the master, that a bottomry bond should be executed in his favor. In common equity, (I am not speaking of legal equity,) I must confess there appears to me to be no difference at all between an agreement for a bond and a bond itself, and upon principles of mere justice, I am at a loss to conceive any distinction between them. It has also been urged, that I have no jurisdiction to decide upon the validity of such an agreement, and that I cannot, if so inclined, afford Mr.

[ \* 121 ] Day the remedy he seeks. Assuming the fact to be so, will that aid the owners of The Panther ? Why should they be benefited at the expense of Mr. Day, or receive more than they would otherwise have obtained, because he has *bond fide* assisted this vessel in her distress ? Am I to give one of the parties in the suit that to which he has no title in law or equity, because I cannot do justice to the other party ? In the cause of damage at least, I have undoubted jurisdiction, and although it may be possible that I have not the power to order the money to be paid to Mr. Day, I can say to what the owner of The Panther is entitled, and I cannot in justice direct that he should be benefited out of the proceeds, so far as they arise from the repairs done by Mr. Day prior to the period of the arrest.

Having thus disposed of the claim which is set up by the owners of The Panther in this cause, the next consideration is, what is the proper course to be adopted with respect to the remaining proceeds

which have been brought into the registry of the court. Here undoubtedly a twofold question of jurisdiction arises in relation to the demand which has been advanced on behalf of Mr. Day.

The first question is, have I jurisdiction, even if a bond had been granted where the ship has never put to sea?

Secondly, have I jurisdiction where a mere agreement for a bond has been entered into, but no bond has been actually given?

Now although in my view of the case it may not be necessary for me to solve these difficulties in the present instance, I must observe, that if this court has no jurisdiction to decide the questions which thus suggest themselves, consequences must arise that may be wholly inconsistent with justice, and \* highly disadvantageous to the general interests of commerce.

In the first case, a foreign vessel might arrive in a port of this country, the master of that vessel might take up money upon bottomry, and by refusing to proceed on his voyage might divest the British bondholder of all remedy for his bond.

In the second case, the bondholder who had advanced his money upon the faith of an agreement for a future bond, might be equally defrauded and deprived of his remedy by the master's refusal to execute the bond for which he had stipulated. I am not aware of any decision in these courts, in which either of these questions has been judicially determined. The decisions in the prize courts are not precisely applicable; it is to be observed, however, that in the prize courts ameliorations have been allowed where the purchaser bought with a bad title, and upon this broad principle of equity, that he might not have known of the infirmity of his title, and that the former owner received all that he lost, namely, the value of his ship.

Under the circumstances of this case, then, the course which I shall pursue is this: I shall pronounce the owner of *The Panther* to be entitled to the value of the ship before the repairs were commenced, and of that portion of the repairs which were done after the arrest took place; and in so deciding I shall not hold him concluded by the present asserted value. With respect to the residue of the proceeds, I shall direct them for the present to remain in the registry, and I shall not order them to be paid out without the consent of the owner of *The Aline*, or at least until notice has been given to him.

If the owner of *The Aline* should appear, (a \* step which is, [\* 123] I think, highly improbable,) to contest the demand of Mr.

Day, and he should satisfy me that I have no jurisdiction to try the question, where there is no bond, but only a mere agreement for a bond, I shall follow the example of Sir Christopher Robinson, and direct the proceeds to remain in the registry until a good title to them

can be established. If, on the other hand, the owner should appear and contest the validity of the agreement upon the ground that the transaction was not a bottomry transaction, and he should induce me to come to the same conclusion, in that case I am inclined to think he could take no benefit, since the owner of The Panther might successfully intervene, and demand the remaining proceeds in liquidation of that portion of his claim which still remains unsatisfied. I do not decide this point at the present moment; but such is my opinion upon the subject, an opinion formed after some consideration.

With respect to the application that is made by the owners of The Panther in this case, that I would direct Mr. Day to bring in the freight which is alleged to have been earned by The Aline *pro rata itineris* in her voyage from Revel to this country, I must observe that there is no proof whatever before the court that any portion of such freight has ever been in the possession of Mr. Day.

Mr. Day expressly denies that he has ever received any such freight, and I cannot infer the contrary from the mere circumstance that Mr. Day has contracted with the agents of the consignees of the cargo, Messrs. Lubbock & Co., for the transshipment of the cargo from this country to her original port of destination. Before the court [ \* 124 ] can direct freight to be brought in, it must be satisfied \* that freight has actually been received. If this point had been established in the present instance, I should have felt no difficulty in acceding to the application, but in the total absence of any such proof, I must reject it.

The only consideration that remains is as to the costs. With respect to these, I regret that such questions should arise in cases of small value; but considering the difficulty of the points that have been discussed, it is impossible that I should give costs.

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### THE EMANCIPATION, TUCKER.

January 31, 1840.

Bonds of bottomry must be construed by the tenor of their contents alone. It is essential for the validity of such bonds that a maritime risk should be directly or indirectly expressed, either in immediate terms, or by necessary inference from the contents of the bond itself.<sup>1</sup>

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<sup>1</sup> [Greely v. Smith, 3 Wood. & Min. 236; Leland v. The Medora, 2, Wood. & Min.

## The Emancipation. 1 W. Rob.

A bond of bottomry is not invalidated by the circumstance of its being given as a security for bills of exchange drawn upon the owner.

Not necessary for the validity of a bond of bottomry that it should carry maritime interest. The fact, however, that only an ordinary rate of interest is demanded is a material circumstance in considering the character of the instrument under litigation.

THIS was a suit instituted by John Adamson, of London, the assignee of a bond of bottomry<sup>1</sup> upon the above ship, her tackle, apparel, stores, and furniture.

92; *Thorndike v. Stone*, 11 Pick. 183; *The Draco*, 2 Sumn. 157; *The Mary*, Paine, 671; 4 Binn. 244; 2 Pet. Adm. R. 295; *Symmonds v. Hogden*, 6 Bingh. 114; s. c. 3 B. & Ad. 50; *The Atlas*, 2 Hagg. Adm. R. 48.]

<sup>1</sup> FORM OF THE BOTTOMRY BOND.

Bahama Islands, New Providence.

To all to whom these presents shall come or may in any wise concern, I, William Henry Tucker, master of the British schooner *Emancipation*, of and belonging to the port of London, in the county of Middlesex, in that part of Great Britain called England, send greeting :

Whereas the said schooner *Emancipation*, sailed from the said port of London on the 23d day of January of this present year of our Lord, 1839, bound to the port of Havana, in the island of Cuba, with a cargo consisting of machinery and sundry merchandise; and whereas the said schooner, while in the prosecution of the said voyage, to wit, on the tenth day of this present month of March, got on shore on the Bahama bank, whence she was lightened off by the crews of sundry Bahama wrecking vessels, and brought into the port of Nassau aforesaid; and whereas for the services so rendered, the sum of 500*l.* sterling, hath been awarded to the crews of the said wrecking vessels by three merchants indifferently chosen to hear and determine in the premises; and the said William Henry Tucker has also incurred further liabilities at the said port of Nassau, for and on account of the said schooner and cargo, to the amount of 81*l.* 6*s.* 3*d.*, equal in the whole to 581*l.* 6*s.* 3*d.*, for which sum of 581*l.* 6*s.* 3*d.*, he, the said William Henry Tucker, hath this day drawn a set of bills of exchange upon Messrs. Polden and Moreton, of London aforesaid, payable at sight to the order of Messrs. John Thompson & Co. Now know ye, that for securing the payment of the said bills of exchange, the said William Henry Tucker, by virtue of the power and authority possessed by him as master of the said schooner *Emancipation*, in cases of necessity and emergency in parts abroad, hath hypothecated, bound, and pledged, and by these presents doth hypothecate, bind, and pledge unto John Grey Meadows, his executors, administrators and assigns, all that the aforesaid schooner *Emancipation*, which said schooner is of the description following; that is to say, has one deck and two masts, is of the length of 68 feet 1½ inch, of the breadth of 19 feet 5½ inches, and of the depth of 10 feet 11 inches, and measures 111 and ¾ths tons, is a schooner with a running bowsprit, square stern, carvel built, no galleries, and male bust figure head; together with all and singular her hull, hold, stores, boats, tackle, apparel, and furniture, and every thing else belonging to her; for the purpose to the intent and meaning, that the said schooner *Emancipation*, her hull, hold, stores, boats, tackle, apparel, and furniture, and every thing else belonging to her, shall be subject, liable and chargeable for the payment and satisfaction of the sum of money in the said set of bills of exchange mentioned and every part thereof, and for all damages, costs and losses

[ \*125 ] \* The act on petition set forth, that, whilst in the prosecution of a voyage from the port of London to the Havana, the

[ \*126 ] \* vessel got on shore on the Bahama bank, from whence she was lightened off by the crews of several Bahama vessels, and brought in safety to the port of Nassau, in New Providence; where claims being preferred by the salvors for their services, the sum of 500*l.* was awarded, to be paid by the master; that the said master was not provided with funds to satisfy the said award, nor to discharge other liabilities, amounting to the sum of 81*l.* 6*s.* 3*d.*, which he had incurred for necessities supplied to and on account of the said vessel at Nassau, and that he had not any credit whatever by which he could procure funds to enable the said vessel to proceed upon her said voyage; and that a sale of the cargo at Nassau, to the amount of such liabilities, would have been at almost a total sacrifice.

That the said master applied to John Thompson and John Grey Meadows, merchants, the agents for Lloyd's at Nassau, to advance the sum of 581*l.* 6*s.* 3*d.*, for the purposes aforesaid; that the said Thompson and Meadows, upon the express condition that the said master should draw bills of exchange upon his owners, and also execute a bond of bottomry, lent and advanced the said sum of 581*l.* 6*s.* 3*d.*, and in consideration thereof the master did, on the 21st day of March last, draw a set of bills of exchange in their favor upon his owners, and did, on and by a certain instrument or bond of

[ \*127 ] bottomry bearing \* even date with the said bills, hypothecate the said vessel, to the effect that the said vessel should be subject and chargeable for the repayment of the said bills, and for all damages, loss, and costs which should accrue in case the same should not be paid; and for interest on the money so advanced, in case any delay should arise in the payment thereof, at the rate of six per cent., until full payment thereof should be made.

which shall or may lawfully accrue in case the said sum of money mentioned in the said bills of exchange shall not be paid by the said Polden and Moreton upon either of the said bills being presented to them for payment, and for interest on the said sum of money, in case any delay shall arise in payment thereof, contrary to the tenor and effect of the said bills, at and after the rate of 6*l.* per cent. until full payment thereof be made, such rate of 6*l.* per cent. being the legal rate of interest at the said Bahama islands.

Provided, nevertheless, and it is the true intent and meaning of this instrument, that if the said Polden and Moreton shall well and truly pay the said sum of money in the said bills of exchange mentioned on the presentation of either of such bills for payment, then this instrument and every clause and article herein contained shall cease and be utterly void, but otherwise shall remain in full force and virtue.

In witness whereof, the said William Henry Tucker, &c., &c.

That the said vessel was, in consequence of the said loan, enabled immediately to proceed, and did proceed on her voyage, and arrived in safety at the port of Havana, where she delivered her cargo, and earned a very considerable freight; that, on the 21st of May last, a bill of exchange for the sum of 581*l.* 6*s.* 3*d.*, drawn by the said master in favor of the said Thompson & Co., was duly presented, and returned dishonored; that the said sum of 581*l.* 6*s.* 3*d.* still remains unpaid; that the vessel arrived in the port of London, about the 12th of September last, and that payment thereof hath been duly demanded of the master, who hath refused or declined to pay the same, &c., &c.

In the reply to the act, it was alleged that the money was advanced originally, not on the credit of the ship, but upon the personal security of the master; that the said master was not without any credit whatever by which he could obtain funds; that the execution of the bond was unnecessary, and that the said bond was invalid, by reason that it was only given for securing payment of the bills of exchange, and also that it did not stipulate that any maritime risk was to be incurred by the lender.

The case was argued by \**Haggard*, in support of the [\* 128] bond.

*Jenner and Harding, contra.*

#### JUDGMENT.

DR. LUSHINGTON. In delivering my judgment in this case, I shall assume that it was the intention of the contracting parties, at the time the bond was executed, to give a good and valid bottomry bond in the legal and strict sense of the term. Assuming this, I am still of opinion that such mere intention alone is not sufficient for the validity of an instrument of this description; and that this court cannot pronounce in favor of any bond, unless it shall appear in express terms, or by necessary inference from the contents of the bond itself, that the transaction was founded upon a bottomry consideration.

The rule of law, that the meaning of written instruments must be construed by the tenor of their contents alone, is strictly applicable to cases of this kind. I must, therefore, look to the bond itself in the present instance, without referring to extrinsic evidence at all; and unless I can come to the conclusion, from the words of the bond, that any maritime risk is to be directly or indirectly inferred, I must hold that I have no authority to pronounce in favor of its validity.

The bond in question recites, "that the vessel had been on shore;



that money had been advanced for salvage and other liabilities incurred by the master, on account of the vessel, at the port of Nassau; that bills of exchange had been drawn by the master upon his owners; and that Tucker, the master, had hypothecated, bound, and pledged unto John Grey Meadows, his executors, &c., the [ \* 129 ] aforesaid \*vessel, for the purpose and to the intent and meaning that the said vessel should be subject, liable, and chargeable for the payment and satisfaction of the sum of money in the said bill of exchange mentioned, and for all damages, costs, and losses which might lawfully accrue in case the sum mentioned in the said bills shall not be paid; and for interest on the said sum of money in case any delay shall arise in the payment thereof contrary to the tenor and effect of the said bills, at and after the rate of 6*l*. per cent., until full payment thereof be made, such rate of 6*l*. per cent. being the legal rate of interest in the said Bahama Islands." And the bond then concludes with the following proviso:—"Provided, nevertheless, that it is the true intent and meaning of this instrument, that if the said owners shall well and truly pay the said sum of money in the said bill of exchange mentioned, on the presentation of either of such bills for payment, then this instrument, and every clause and article herein contained, shall cease and be utterly void, &c."

Now, looking to the terms in which the bond is thus drawn up, it is clear in the first place, upon the face of it, that it was given as a security for the bills of exchange which had been drawn by the master upon his owners. This circumstance, however, would not affect its validity under the principles laid down by the court in former cases. In the case of *The Augusta*,<sup>1</sup> it was decided, that where bills of exchange were given as a collateral security for a bond of bottomry, the bills would not destroy the validity of the bond; and in the case of

*The Tartar*, reported in 1st Haggard, it was also held, that [ \* 130 ] a bottomry bond indorsed as a collateral security for \*bills of exchange would not be vitiated in consequence of such indorsement.

If the objection, therefore, to the bondholder's claim in this case was confined to the mere fact that the bond was given for securing the payment of the money advanced, for which bills were given, the opposers of it would derive no advantage from such an objection.

But the terms in which the bond is drawn up suggest another consideration of much greater importance as affecting its validity; namely, the total absence of any mention of a maritime risk, either express or

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<sup>1</sup> [1 Dod. 283.]

implied, in the body of the instrument in question. I have looked in vain for any words from which I could draw an inference that any maritime risk was intended. It cannot be inferred from the word hypothecate alone; for that is an ambiguous expression, and may mean bottomry or mortgage only. Again, it cannot be inferred from the rate of interest for which stipulation is made, for what is the interest demanded? Why, only 6*l.* per cent., being the legal rate of interest in the Bahama islands. I am aware that it is not absolutely necessary that a bottomry bond should carry maritime interest, and that a party may be content with ordinary interest; but when the character of an instrument is to be collected from its contents, and where the argument in support of the bond is, that the advance of the money was attended with risk, it is a material circumstance, that only an ordinary rate of interest should be demanded. It is impossible to conceive that any merchant carrying on his business with ordinary care and caution, would be content to divest himself of all security for the loan of his money but a bottomry bond, and ask no greater \*emolument than the ordinary interest of 6*l.* per [\* 131] cent., if the repayment of such loan was to depend upon the safe arrival of the vessel at the port of her destination, after performing such a voyage.

Under the circumstances of this case, therefore, I am perfectly satisfied, that whatever might have been the intention of the contracting parties to this bond, both upon the face of the bond itself, and according to legal inference, the payment of the money advanced does not depend upon the safe arrival of the ship. I must, therefore, pronounce against the bond. With respect to the costs, I must decline to grant the prayer that has been made of the costs of this suit; as I think that the omission of maritime risk has been a mistake on the part of the drawer of the bond.

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The Diana. 1 W. Rob.

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THE DIANA. Greig.

February 12, 1840.

Construction of Pilot Act, 6 Geo. IV. c., 125. The exemption from liability conferred by the act, does not apply when the damage has been occasioned by the joint misconduct of the pilot and the crew on board of the vessel proceeded against.<sup>1</sup>

Costs given from the time the act was written to upon the merits of the case.

THIS was a cause of damage by collision. An appearance was originally given under protest for the owners of The Diana, but the court overruled the protest, and assigned the parties to appear absolutely.

The act on petition stated, that at about half past nine o'clock in the morning of the 9th of September, 1838,<sup>2</sup> The Little-  
[ \* 132 ] hampton, of Sunderland, whilst \* on a voyage from that port to the port of Worthing, with a cargo of coals, was working to windward through the Gull Stream, with a weather tide on the larboard tack, the weather being remarkably fine and clear; that The Diana, with studding sails set below and aloft, was observed running before the wind, and approaching The Littlehampton; that the crew of The Littlehampton hailed The Diana to alter her course, and continued so hailing, until she was within thirty or forty fathoms of The Littlehampton; when, finding that no notice was taken, the master of The Littlehampton ordered the helm to be put up for the purpose of wearing ship; but while in the act of so wearing, The Diana came on board The Littlehampton, striking her with great violence on the starboard side, and cutting her down to the water's edge. That The Littlehampton, in consequence of the injury she had sustained, shortly afterwards went down in deep water, and the crew escaped with difficulty in their boats. That the accident was wholly occasioned by the fault of The Diana, in not altering her course, and in not keeping a good look-out.

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<sup>1</sup> [See The Duke of Manchester, 2 W. Rob. 479; The Christina, 3 W. Rob. 27; The Christiana, 7 Notes of Cases, 2.]

<sup>2</sup> The delay in the institution of this suit was occasioned by the death of the late judge, Sir John Nicholl, which took place in the month of September, 1838. In consequence of his successor not being immediately appointed, no warrant of arrest was extracted from the registry at the time; and The Diana having proceeded on a foreign voyage, escaped out of the jurisdiction of the court, from that period till the month of March, 1839, when she was discovered at Liverpool, and arrested.

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The Diana. 1 W. Rob.

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In reply to the act, it was denied by the owners of The Diana, that no good look-out was kept on board their vessel ; on the contrary, it was alleged, that The Littlehampton was observed, when distant about a quarter of a mile from the Diana, and that the helm of The Diana was immediately put a-port, by which means the course of the two vessels became clear of each other. That The Littlehampton, instead of continuing her reach on the larboard tack, for which there was ample room, bore round and endeavored to cross The Diana, although repeatedly \*hailed to return to the other [ \*133 ] tack ; that the helm of The Diana was immediately put hard a-starboard, but that both vessels had so much way, that before The Diana could answer her helm, the collision took place.

Lastly, that even if the accident had been caused by the neglect or incapacity of any one on board The Diana, that the same was and could only be attributable to the pilot, inasmuch as The Diana at the time was in the sole charge of the said pilot, and that all his orders were duly obeyed by the man at the helm and the rest of the crew.

That the said pilot having been taken on board under the provisions of the act 6 George IV. c. 125, by reason of the premises, the owners of The Diana were not answerable for the damage.

The case was argued before Trinity Masters upon the 31st of January, by

The *Queen's Advocate* and *Curteis*, for the owners of The Littlehampton.

*Addams* and *Pratt*, *contra*.

The Trinity Masters having pronounced that the accident was occasioned by the neglect and deficiency of a good look-out and management on board The Diana, the court reserved its judgment till this day.

#### JUDGMENT.

DR. LUSHINGTON. This case came on for hearing upon the last court day, when the court was assisted by the presence of Trinity Masters.

It appears from the statement on both sides, that the collision took place in the Gull Channel, between Ramsgate and Broadstairs ; that The Diana, at \*the time of the accident, was [ \*134 ] proceeding up channel under the charge of a pilot, and The Littlehampton working down channel, and that The Littlehampton

sustained so much damage in consequence, that she was eventually sunk.

On the part of The Littlehampton, it is averred, that the accident was occasioned by the fault of the persons on board The Diana ; and on the part of The Diana, an attempt has been made to shift the blame from themselves, and transfer it to the crew of The Littlehampton.

Now the Trinity Masters were of opinion, (and in that opinion I concur,) that the collision was not occasioned by any misconduct or fault of those on board The Littlehampton. The point was directly put to them by the court, and they expressed their opinion that the accident was solely occasioned by the fault of the persons on board The Diana.

Having ascertained this preliminary point, according to the principles I have formerly laid down, (and to which I intend to adhere till otherwise set right or corrected by a superior tribunal,) I must hold that the vessel thus doing the damage is *prima facie* responsible for the damage she has occasioned ; and that the owners of The Diana, in order to discharge themselves from such responsibility in the present instance, must bring themselves within the exception marked out by the act.

This exception, in my construction of the act, is limited to the case of vessels having a pilot on board under the provisions of the act, and where a damage is occasioned solely and entirely through the ignorance, incapacity, or misconduct of the pilot so on board.

[ \* 135 ] \* The question then is, whether the owners of The Diana have brought themselves within this exception in the present instance ? This point again was expressly put by the court to the Trinity Masters upon the last court day, and they were of opinion, that both the pilot and the crew of The Diana were to blame. Does this new state of circumstances bring the owners of The Diana within the exception of the statute ? To obtain the exemption from responsibility conferred by the act, I think that the owners of The Diana should prove that the accident arose entirely from the fault of the pilot ; that the exception under the act ought to be construed strictly ; and that if the accident was occasioned by the joint misconduct of the pilot and crew, I am bound to hold that the liability still attaches to the owners.

That the facts are as I have stated, and the Trinity Masters thought, the evidence in the cause shows. It was expressly pleaded, on the part of the owners of The Littlehampton, that there was not a good look-out on board of The Diana. This plea was directly

contradicted on the part of The Diana, and the result of my own examination of the evidence is, that the proof of the affirmative is altogether deficient. In the affidavits of the master and mate, it is admitted that they were both below deck, having given up the management of the vessel to the pilot; and it is only stated in one affidavit, made at a late period, that there was any look-out at all on the fore-castle at the time the collision occurred.

It was rightly observed by the Trinity Masters, that the mere fact of taking a pilot on board, under the provisions of the statute, did not exonerate the \*master and crew from the [ \*136 ] proper observance of their own duty. Although the directions of the pilot may be imperative upon them as to the course the vessel is to pursue, the management of the ship itself is still under the control of the master. It is his duty to secure the safe conduct of his vessel, by issuing the necessary orders, and it is the duty of the crew to carry these orders into execution; and for the due performance of their relative duties, the master and crew are still respectively responsible.

In the course of the argument, it was suggested that, looking at the period of the day, and the course the vessels were pursuing, no look-out was strictly necessary. But the Trinity Masters were of opinion, (and rightly so in my judgment,) that, looking at the course The Diana was pursuing, the part of the sea she was navigating, and the number of vessels she was likely to encounter in the course of that navigation, it was the duty of the persons on board to have kept a good look-out by day as well as by night.

Under the circumstances of the present case, then, I am of opinion, that no such look-out was kept on board the Diana at the time the collision in question occurred; that the master and crew were in consequence neglectful of their duty, and being the servants of the owner, such owner is responsible for their neglect.

The course, therefore, which I must pursue, is to pronounce for the damage occasioned, together with the costs of these proceedings. But, considering that the preliminary steps that have been taken in this cause were necessary to determine the proper course to be pursued, I shall not give the costs from the first commencement of the proceedings, but only \*from the time the act was [ \*137 ] written to by the owners of The Diana, with reference to the merits of the case.

The sentence of the court was appealed from, and upon the 19th of February, 1842, the judicial committee of the privy council dis-

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The Mona. 1 W. Rob.

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missed the appeal, and affirmed the judgment of the court below.<sup>1</sup>

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THE MONA, Glass.

March 18, 1840.

The Court of Admiralty has no jurisdiction to adjudicate, when the claim for wages is founded, not upon the usual mariners' contract, but upon a special agreement.

THIS was a question as to the admissibility of a summary petition brought in by John Paul, a mariner on board this vessel, in a suit for subtraction of wages.

The petition pleaded —

First, that some time in or about the month of October, 1839, the vessel The Mona, whereof the said Glass was master, was lying at the island of St. Helena, bound to proceed with the cargo laden therein to the port of London; that the master, being in a peculiarly distressed situation, from the circumstance of several of the crew having refused to proceed with the said vessel, and he being unable to procure a sufficient number of men for that purpose, and having ascertained that, provided the said John Paul would join the ship, the necessary number of men could then be procured to navigate her as required by law, the said master did thereupon request, and did, in and by certain letters which he addressed and sent to the said John Paul, urge him to proceed in the said vessel to England, and for which service the said master did, in and by the said letters, engage and promise to pay the said John Paul, in England, the sum [\* 138] of 50*l*. sterling, \*and likewise to pay the expenses of a cabin passage for the said John Paul back to the island of St. Helena; that it being necessary, in order to complete the regulated number of the crew, and in conformity with the provisions of the act of parliament, that the name of the said John Paul should appear in the ship's articles, the said master requested the said John Paul to subscribe the said articles, under the assurance that no advantage should be taken of him by reason thereof. The remainder of the article then set forth that the ship's articles were signed by the said John Paul on faith of such assurance, and that he served on board the vessel, and duly discharged his duties, till her arrival in England, in

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<sup>1</sup> [4 Moore, 11.]

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The Mona. 1 W. Rob.

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December, 1839, when he was discharged without payment of his wages, or of his necessary expenses as a cabin passenger back to St. Helena; and that such expenses would amount to 70*l*. The second article pleaded and annexed, in supply of proof, the letters, &c., referred to in the foregoing article.

The admission of the petition was opposed, on behalf of the owners, by *Addams*, who submitted — That the claim which it set up was founded, not upon the usual mariner's contract, but upon a special agreement, the cognizance of which belonged to another tribunal; that under the doctrine laid down by Lord Tenterden, in his book on Shipping, and adopted by this court in the cases of *The Isabella*, 2 Rob. p. 241, and *The Sydney Cove*, 1 Dod. p. 11, this court had no jurisdiction to entertain the present suit, and that in so doing it would be subjected to a prohibition from the courts of common law. Lastly, that the signing of the ship's articles by \* the mariner, in this case, was not in conformity with the [\* 139] provisions of the act of parliament, 5 & 6 W. IV. c. 19, s. 2.

*Jenner, contra* — That the doctrine laid down by Lord Tenterden did not apply to the present case; that in the case of *Opy v. Child*, Salk. 31, cited in Lord Tenterden's treatise on Shipping, the Court of King's Bench held that the jurisdiction of the Court of Admiralty, in suits for seamen's wages, was thus limited: — That if there be any special agreement by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such a case a prohibition shall be granted; that in this case there was nothing in the agreement out of the usual form, saving what arose from the peculiar circumstances of the case. Lastly, that there was a distinction between this case and *The Isabella*; for that in the latter case the contract was made and the seamen taken on board in a port of this country; that the 5 & 6 Will. IV. c. 19, as well as the former act on this subject, related to mariners going from this country, and not to those taken on board at a foreign port.

#### JUDGMENT.

DR. LUSHINGTON. In deciding upon the admissibility of this petition, which comes before the court under circumstances of some peculiarity, I must first advert to the letters which have been pleaded and annexed in supply of proof of the mariner's demand.

The first letter bears date the 23d of October, 1839, and is to the following effect: —

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[ \* 140 ] \* "Dear Sir, — Providing you go home with me in The Mona, I agree to pay you 50*l.* sterling in London, on my arrival in The Mona, on demand, and likewise to furnish you with a passage out again to St. Helena ; all I expect, or will ask you to do, is to pull a rope when I do."

The second letter is dated the 25th of October, 1839, and its contents are these : —

"Dear Sir, — As you are aware of the peculiarly distressed situation in which I am placed, from the circumstance of several of my crew refusing to proceed in the vessel under present arrangements, and having ascertained that, provided you join the vessel, the necessary number of men can be procured to navigate her as required by law, I am induced to request you will oblige me by proceeding in the vessel to England, so as to effect the desirable end of facilitating her despatch from this to her destined port ; and for which I will engage to pay you in England the sum of 50*l.* sterling, and if you require it, pay the expense of your cabin passage back to the island, either direct or *via* the Cape of Good Hope. It may be necessary, in order to complete the regulated number of hands, to have your name in the articles, and to this I trust you will have no objection ; it is unnecessary to assure you that no advantage will be taken of your being thus placed on the ship's articles. Urging your compliance with my wishes, I am," &c., &c., &c.

These letters are alleged to have been written and sent to the mariner by the master of The Mona, whilst that vessel was lying in the harbor of St. Helena ; and it is perfectly clear, both from the tenor of the letters and also from the summary petition itself, that [ \* 141 ] the present action is founded \* upon a special agreement between the seaman and the master of The Mona, and not upon the ordinary mariner's contract.

The question, therefore, which presents itself for the consideration of the court is, whether, under the circumstances of the case, the court would not be in danger of a prohibition, in proceeding to entertain the present suit ?

If such a result was likely to ensue, I am clearly of opinion, that I ought not to attempt to exercise any jurisdiction in the case ; and for this reason, that the defect of authority in this court to try the cause, would not arise *propter defectum triationis*, but because the court itself has no jurisdiction over the subject-matter.

Now looking to the authorities that have been cited in objection to the admission of the summary petition, the effect of those authorities is, I apprehend, plainly this ; that where there is a special agreement differing from the ordinary mariner's contract, this court has no power

to adjudicate, and the cognizance of the question belongs to another jurisdiction. This doctrine is expressly laid down by Lord Tenterden in his treatise on Shipping; and it has also been adopted in the practice of this court, by Lord Stowell, in the case of *The Sydney Cove*,<sup>1</sup> referred to by the counsel for the owners. In that case, which was also a case of wages, the learned judge rejected an additional article which was brought in by the promoter of the suit, upon the express ground, that it pleaded a special agreement, which the court had no authority to enforce.

How far, then, are the authorities to which I have thus referred, binding upon the present case? It \* is not even [ \* 142 ] pretended, on behalf of the seaman, that there has been that species of service performed by him upon which the jurisdiction of this court is founded; namely, the discharge of the ordinary duty of a seaman in the ordinary and accustomed manner. On the contrary, it is directly stated, that he was not to be required to perform a mariner's duty at all; for the master himself in his letter says, "all I expect or require, and will ask you to do, is to pull a rope when I do." Again, there is this further peculiarity in the present case, that the ship's articles, as suggested by the very terms of the summary petition, are said to be wholly set aside; and the signing of those articles by the seaman is alleged to have been a mere matter of form, to complete the number of the crew required by law to navigate the vessel.

The circumstances of the case are undoubtedly peculiar, and altogether different from any case which has heretofore come under the consideration of the court; but I hold myself bound by the authorities to which I have adverted, to consider the agreement which is set up in the plea to be such a special agreement as this court has no power to enforce. I must therefore decide at once, without waiting till a prohibition issues, that I have no jurisdiction to entertain the suit, and must reject the summary petition. By this decision the mariner will not be subjected to any hardship, inasmuch as the rejection of his petition in this court will in no degree prevent him from recovering his claim elsewhere, according to the terms of the original agreement.

Petition rejected.

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<sup>1</sup> [1 Dod. 11.]

[ \* 143 ]

• THE GOLUBCHICK, Bernardos.

May 7, 1840.

The Court of Admiralty has a right to interpose in suits for wages promoted by foreign seamen against foreign vessels.

Consent of foreign minister or consul not essential to found the jurisdiction of the court in such suits. It is necessary, however, that notice of intended proceedings should be given in the first instance to the representative of the government to which the vessel proceeded against belongs.

THIS was a suit for wages, promoted by three Spanish mariners, who served on board this vessel.

An appearance was given for the master under protest, setting forth that the vessel, the property of Russian subjects sailed under Russian colors in the month of September, 1838, on a voyage from Marseilles to Barcelona, and from thence to the coast of Africa; that in the month of April, 1839, she was boarded by an officer of her Majesty's brig *Saracen*, and sent to Sierra Leone, where some proceeding were instituted before the mixed Commission Court, and after a few days' detention, the vessel was released; that subsequent to the said release, she was again boarded by the same officer and sent to England, where she arrived on the 11th of June; that after considerable delay, she was again restored to the master as the agent of the owners, and was about to leave this country in the prosecution of her voyage, when she was prevented by the institution of this suit; that the said suit had been promoted without the sanction or consent of the Russian consul or any other accredited agent of that government in this country, and that by reason thereof it was not competent to the court to entertain the proceedings.

The reply to the protest on behalf of the seamen admitted the facts as stated, but denied the want of jurisdiction in the court to entertain the cause; it also further stated, that whilst the vessel remained at

Portsmouth, the said seamen were respectively discharged

[ \* 144 ] without payment of their wages, and that the master refused to retain them in the service of the ship.

A rejoinder to this reply was given in by the master, alleging that the seamen quitted the vessel voluntarily, and refused to return on board; that an advance of money had been made to them by the master, for the payment whereof a written acknowledgment had been signed by the seamen, and in which they renounced all further claims upon the owners till indemnification for the ship's detention had been obtained from the British government; it also alleged, that by the

laws and regulations of the Spanish marine, any subject of that country serving as a seaman on board a foreign ship, without the license of the Spanish authorities, forfeited his Spanish character *pro hac vice*, and is, as regards such service, deemed to be of the country to which such foreign ship belongs.

In support of the protest, *Addams* argued — That by the law of Spain, the mariners had forfeited their Spanish character, and *pro hac vice* were to be considered as Russian subjects; that it was an admitted fact in the case, that the consent of the accredited agent of the Russian government had not been obtained for the institution of this suit; and that under the authority of the cases *The Two Friends*, reported in *Robinson*, vol. i. p. 271, and *The Courtney*, reported in *Edwards*, p. 239, the court had no jurisdiction, in the absence of such consent, to entertain the question. That the alleged discharge of the seamen in this country was the only circumstance that would give even a shadow of pretence for the interposition of the court's authority, and the balance of the evidence clearly \* established that [ \* 145 ] the mariners voluntarily abandoned the service of the vessel, and were not discharged by the captain, as alleged by them in their reply to the protest.

For the mariners, *Queen's Advocate*, *contra* — That the alleged desertion of the seamen was not a matter of protest, but of defensive plea, and had no bearing upon the question immediately in issue; the point to be decided was, whether the court had or had not jurisdiction to entertain a suit for wages earned by foreign seamen of one nation on board a foreign vessel of another nation, both being alien friends; that the mariners' title to their wages was founded, not upon the municipal law of this or any other particular country, but upon the universal maritime law; and Courts of Admiralty in administering that law, had a general jurisdiction over such matters. This had been laid down by a judge of the highest celebrity in America, in a case reported in the 2d volume of *Gallison's American Reports*, p. 198, and upon this principle it was to be maintained that this court had jurisdiction to entertain the seamen's suit in the present instance; that with respect to the cases which had been cited in objection to the jurisdiction of the court, it was to be observed, that the cases cited were distinguishable from and did not apply to the present case. In the case of *The Two Friends*, the point to be decided, was the right of British seamen to sue in this country for salvage, on recapture of an American vessel on board of which they had served, and the *dictum* of Lord Stowell in that case

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The Golubchick. 1 W. Rob.

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was a mere *obiter dictum* of that very learned judge. Again, [ \* 146 ] in the case of *The Courtney*, which, it is true, was a \* case of wages promoted by foreigners serving on board a foreign ship, the court declined to exercise its jurisdiction, upon the ground that a penalty was claimed by the mariners under a municipal law of America, in addition to the wages they had earned. A part of the claim, therefore, in that case, as Lord Stowell observed, did not arise out of the general maritime law, but merely out of a municipal law of the foreign country, which this court had no authority to enforce. Lastly, that the principle involved in the present question had been already, in some degree, acted upon by the court, in the case of *The Johann Friederich*;<sup>1</sup> and under the peculiar circumstances of the present case, it would be almost a denial of justice, if the court should refuse its jurisdiction, and compel the destitute mariners to resort for their remedy to a foreign tribunal, to which they might have no access from want of funds; the wages having been earned upon the high seas, and the vessel being, at the time of arrest, clearly and undeniably within the jurisdiction of the court.

#### JUDGMENT.

DR. LUSHINGTON. The question which has been raised in this case, is the first question of the kind that has come before the court, since I have been in this chair. I have, therefore, felt anxious to examine carefully the principle upon which this court exercises jurisdiction, with respect to seamen serving on board foreign vessels. In support of the protest, it has been urged, that the court has no jurisdiction, save by consent of the ambassador, consul, or minister of the country to which the vessel belongs. This notion, I am [ \* 147 ] aware, has prevailed in these courts with \* respect to cases of this kind, but I must confess, that I have always felt considerable difficulty upon the point; and for this reason, that if the court does not possess an inherent jurisdiction over the subject-matter, it is not possible that the consent of an individual could confer any such jurisdiction. I think, therefore, that the proper mode of considering the question is this: the court must possess original jurisdiction over the subject-matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British court of judicature.

Now upon general principle, I apprehend that this court, administering, as it does, a part of the maritime law of the world, would have a right to interpose in cases of the present description. Can it then

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<sup>1</sup> [ 1 W. Rob. 35. ]

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be consistent with the principles of justice, that the exercise of this right should depend entirely upon the consent of a foreign minister or consul, who should be authorized to prohibit the court altogether, or to induce it from exercising its jurisdiction? How would the question stand in other courts? In other courts of this country, I have no doubt, that the mariners might have instituted an action *in personam* against the master without reference to any consent at all. Why, then, should not proceedings be competent on their part in this court against the ship? For by the general maritime law, the ship is the primary security for their wages. Is it just or proper, that the consent of the foreign representative should be necessary to put this court in motion, and should not be necessary in a court of common law? How is it possible there can be any such difference between them?

Upon general principle, then, I am inclined to \*hold, that [ \* 148 ] this court does possess a competent jurisdiction to adjudicate in these cases; at the same time, the exercise of this jurisdiction is discretionary with the court, and if the consent of the representative of the government to which the vessel belongs is withheld, upon reasonable grounds being shown, the court might decline to exercise its authority. Indeed, circumstances might occur upon the face of the case itself, in which this difficulty might arise; that the matter in dispute was so connected with the municipal law of a foreign country, that this court would be incompetent to render impartial justice; in such cases, undoubtedly, the court would decline to adjudicate. Having thus stated my opinion, that upon general principle, this court has an authority in cases of this kind between foreigners, and that the propriety of exercising that authority must depend upon the circumstances of each particular case, I will now shortly advert to the cases which have been reported. These are but few, and I cannot find that, in any of them, the point in question has ever been directly decided. In the case of *The Courtney*,<sup>1</sup> which has been referred to by the counsel for the owners; it is true, that Lord Stowell, to whose high authority I should always be disposed to pay the greatest respect and attention, expressed himself in terms implying an opinion, that the Court of Admiralty could not entertain a suit of this kind without the consent of the representative of the foreign nation to which the vessel belonged; but it is to be observed, that the decision in that case is not a decision in point, insomuch that the mariners in that case sued for a penalty beyond their wages under an

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<sup>1</sup> [ Edw. 239. ]

act of the American Congress; the difficulty, therefore, [ \* 149 ] which \* Lord Stowell had to contend with in that case was, that he could not enforce the municipal law of the country upon which a part of the mariners' claim was founded.

The next case is the case of *The Madonna d'Idra*, reported in the first volume of Dodson; with respect to which it is also to be remarked, that the case reported does not bear very much upon the case in question. The vessel, it appears, had been sold in a cause of bottomry; a claim upon the proceeds was preferred by certain Greek mariners, and the question was, whether they were entitled to priority of payment. A further distinction is also to be noticed with respect to that case, namely, that the captain was bound, by the law of Turkey, to take his men back again, or to find them conveyance in other vessels; the mariners, therefore, had a lien upon the proceeds of the ship for their subsistence.

The next case is the case of *The Wilhelm Frederick*, 1st Haggard; but in this case, the question was only incidentally raised; the court held, that the ship, at the time of arrest, was a British vessel, the foreign owner having directed that she should be given up to satisfy the demands of British creditors. The decision in that case, therefore, was only to this extent, that the surrender of the vessel by the foreign owner was sufficient to entitle the seamen to proceed in this court to establish their claim.

The last case to which I shall advert, is the case of *The Adolph*, 3d Haggard, p. 249; the proceedings in that case were *in panam* against a Hamburg ship, in a cause of bottomry, and an application was made to the court by one of the bondholders, that he might be allowed to pay the wages of the crew, and have a priority [ \* 150 ] over the other bondholders for the \* amount of the wages so paid out of the proceeds of the ship. Sir John Nicholl, before whom the motion was made, declined to make any order, upon the ground that there was no one to consent. This was the extent of the learned judge's decision in the case of *The Adolph*, and although it bears more closely than the other cases to which I have adverted, upon the point to be decided in the present instance, it cannot, I think, be regarded as a positive decision upon the point in question.

The matter resting thus with respect to the reported cases, I shall now address my consideration to one or two of the circumstances peculiar to this case. In the course of the argument, a discussion has been raised by the counsel in the cause, whether the seamen promoting the proceedings are to be considered as Spanish subjects, or whether, for the purposes of this suit, they are to be regarded as subjects of the Russian government. Now, upon this point, I entertain

no doubt whatever; it is, I conceive, a settled doctrine of law, that when a subject of one country enters into the service of a ship belonging to the subjects of another country, he must be considered *pro hac vice* to be a subject of that country to which the vessel belongs. As regards the promoters of the present proceedings, therefore, I have no hesitation in saying, that for the purposes of the present claim, they are to be considered as Russian subjects, and this upon general principle, without reference to the particular ordinance of the Spanish marine, which has been pleaded in the rejoinder that has been given in. Another point that has been pressed by the counsel in arguing the case, is the alleged discharge of the mariners in this country; and it was urged with considerable force \*in sup- [ \*151 ] port of the mariners' claim, that it would be an extreme hardship upon the seamen, if the court should allow them to be turned adrift in this country, and the vessel to proceed to any part of the world to which the owners might think fit to send her; thereby compelling the seamen to seek their remedy in a foreign tribunal, to which they might have no means of access from want of resources. Now this circumstance, if duly established, would undoubtedly be deserving of some consideration from the court; at the same time, it must be observed, that the alleged hardship upon the mariners, if the court should decline to entertain their claim, could not, of itself, confer a jurisdiction upon the court; if the court were possessed of an original jurisdiction, it might furnish a strong inducement for the exercise of that jurisdiction in the present instance; but it would not give a jurisdiction which the court did not previously possess. It is also to be observed, that the fact itself of the asserted discharge of the seamen is directly put in issue in the pleadings. In deciding the question that has been raised, therefore, I cannot rely upon the fact whether they were discharged or not. The last circumstance in the case to which I must advert, is of a very peculiar nature; namely, that the court is entirely uninstructed as to the original intention of the owners of this vessel respecting the termination of the voyage; and also respecting the nature of the hiring, and the terms upon which the mariners were engaged. These facts must have been within the entire knowledge of the master, and should have been explained in the protest. In the total absence of any information upon these points, the court is placed in some difficulty; for if it is to enter into a consideration \*of the case, it is undoubtedly [ \*152 ] a matter of no small importance, that the court should know whether the vessel was destined to a Russian port, or to the port of any other country. Under the circumstances of the case, then, the course which I shall adopt is this; I shall direct the registrar to write a letter



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to the Russian consul, stating that the suit has been commenced, and requesting that he will make such a representation to the court as he shall think fit upon the subject. If he consents to the proceedings, there will be no further difficulty; if he refuses to consent, or declines to interfere altogether, I shall then have to determine upon the course to be pursued by the court under the circumstances.

Upon the 21st of May, a letter was addressed to the registrar of the court, by the Russian consul, to the following effect:—

“Russian Consulate-General, }  
21st May, 1840. }

“Sir,—I have the honor to acknowledge the receipt of your letter of the 16th instant, and in reply, to acquaint you, that having been informed by the owner of The Golubchick, who is a Russian subject, that the said vessel is no longer to be navigated under the Russian flag, but peremptorily to be sold here; I shall not, in my official character as consul-general of his Imperial Majesty of all the Russias, interfere in the cause, &c., &c.

“I beg, however, that this letter may not be construed on my part, into an assent or a dissent from the proceedings which have been instituted against the vessel, without my sanction having [ \* 153 ] been previously \* asked or obtained, and at the same time to inform you, that I consider much inconvenience would arise, if vessels trading to this country, Russian owned, and navigated under the Russian flag, were liable to be seized by process from the Admiralty Court in this country, for wages due to the seamen under contracts which should be regulated by the Russian, and not by the British code of maritime laws. I have,” &c., &c.

Upon the second session of Trinity term, 4th of June, 1840, the court finally disposed of the question, with the following observations.

PER CURIAM.

Since the question was argued upon a former court day, I have had an opportunity of considering the case referred to in the American Reports, namely, the case of The Jerusalem.<sup>1</sup>

The decision in that case was pronounced by a judge of the highest eminence, Mr. Justice Story; and the principles laid down in

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<sup>1</sup> [2 Gall. 191.]

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The Golubchick. 1 W. Rob.

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that decision most strongly confirm the previous impression of my own mind, that the court has a jurisdiction in all cases of wages as questions of general maritime law; although in some cases circumstances may arise to induce the court to decline the exercise of that jurisdiction.

In the present case I am relieved from all doubt and difficulty as to the course which I shall adopt, by the letter which has been addressed to the registrar of this court by the Russian consul. That letter states, that the vessel proceeded against is no longer to be navigated under the Russian flag, but to be peremptorily sold here. The voyage must, therefore, \*be considered as [ \*154 ] having terminated in this country, and the case is consequently one in which the court is bound to exercise its jurisdiction.

I must, therefore, overrule the protest, and allow the cause to proceed; and I wish it to be understood, that in all future cases of this kind, it must be held to be indispensable that notice of the intended proceedings should be given in the first instance to the representative of the foreign government. In so directing, I do not mean to intimate that the court would feel imperatively bound to act in accordance with the views that might be entertained by such representative; but I consider it is expedient that such intimation should be given in order that, if any objection should be taken against the prosecution of the proceedings in this court, the court being informed of the grounds upon which such objection is taken, might be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause. With respect to the question of costs, I shall give no costs; the question which has been raised is a question *primæ impressionis*, in which I have in some measure already exceeded what any of my predecessors have done.

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The Hope. 1 W. Rob.

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## THE HOPE, Hepburn.

June 16, 1840.

The value of a vessel condemned in a cause of damage, insufficient to answer the damage. The master also a part owner.

*Semble*, not competent for the court to ingraft upon a proceeding *in rem*, a personal action against him to make good the excess of damage beyond the proceeds of the ship.<sup>1</sup>

THIS was a cause of damage by collision, promoted by the owners of the brig Nelson, against the schooner The Hope, her tackle apparel, and furniture, &c.

[\* 155] \*At the time the accident occurred, The Hope, of the burden of 106 tons, and navigated by a crew of eight men, was proceeding with a general cargo, bound on a voyage from London to Inverness; and the brig Nelson was pursuing her course southwards, bound from Seaham to Southampton, with a cargo of coals, and a crew of only six hands on board. The collision took place at midnight upon the 7th of February, when both vessels were off Filey, on the coast of Yorkshire; and The Nelson, in consequence of the damage she had sustained, was sunk and totally lost, the crew taking refuge on board The Hope.

For the owners of The Nelson, *Queen Advocate*, and *Harding*, submitted — That The Hope being upon the larboard tack with the wind free, and The Nelson being close-hauled, and upon the starboard tack, it was the duty of The Hope, according to the rule of navigation laid down by the court in former cases, to have given way, and that The Nelson acted properly in pursuing her course; that the night was clear and starlight, and the statement set up by the owners of The Hope themselves, in their reply to the act on petition, conclusively established, that a good look-out was not kept on board The Hope, and that the accident was entirely imputable to that vessel.

*Addams* and *Robinson*, *contra*, for the owners of The Hope — That The Nelson was inadequately manned, and there was no evidence to show that the accident was occasioned by the mismanagement or misconduct of the persons on board The Hope; that the two vessels

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<sup>1</sup> [The Kalamazoo, 9 Law & Eq. R. 557.]

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The Hope. 1 W. Rob.

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were approaching each other in opposite directions, The \*Nelson bearing to the south, and The Hope to the north [ \* 156 ] or north-west, the wind at the time being west-south-west, and free for both vessels ; that according to the representation of the persons on board The Nelson, the vessels could have been seen at three quarters of a mile's distance from each other ; and if so, it must have been obvious to the persons on board The Nelson, that the crew of The Hope were occupied at the time of the accident in shortening sail ; it was, therefore, the duty of the Nelson to have given way, notwithstanding the rule of navigation relied on ; and that it was solely in consequence of The Nelson's obstinacy in pursuing her original course that the damage in question was occasioned.

The court, in stating the facts of the case to the Trinity Masters, by whom it was assisted, observed — In the course of the argument, blame has been imputed to The Nelson, that she was not sufficiently manned ; but I am of opinion that this circumstance in no degree enters into the consideration of this case. It is clear, that nothing was done by that vessel which raises the question in any manner whatever, and in point of law, it would not be simply a question of fact, whether, the vessel was undermanned, but whether, in consequence of a deficiency of hands on board her, she was not under sufficient control. It has also been further urged in the argument, that if it was in the power of The Nelson, to have avoided the collision by giving way, she was bound to have done so, notwithstanding the rule of navigation that has been referred to. As a proposition of law, I admit it to be true, that no vessel should unnecessarily \*incur the probability of a collision by a pertinacious [ \* 157 ] adherence to the strict rule of navigation.<sup>1</sup> If a steam-vessel, for instance, should be nearing another sailing vessel, and such vessel should be steered erroneously ; if the master of the steam-vessel should wilfully say this vessel is steering wrong, but we will keep our course, and a collision ensues in consequence, I should undoubtedly hold that the steam-vessel was to blame. The case, however, is widely different with respect to two sailing vessels, where there is an acknowledged rule which each vessel is bound to follow ; if, because one vessel which ought to give way was reefing sails, the other should act contrary to custom, the rule would be relaxed, and such an uncertainty ensue as might lead to the very mischief which the rule was expressly framed to prevent.

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<sup>1</sup> [The Commerce, 3 W. Rob. 287.]

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The Hope. 1 W. Rob.

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Under the circumstances of the case, the Trinity Masters were of opinion, that The Nelson, being upon the starboard tack, did right in pursuing her course, and that The Hope was to blame in not giving way. The court accordingly pronounced for the damage sued for.

The *Queen's Advocate* then submitted — That the damage sustained by the owners of The Nelson was between 1,300*l.* and 1,400*l.*, and the value of The Hope was only 810*l.*; it was, therefore, wholly insufficient to answer the damage in full, although bail had been given in 1,500*l.*, that the master of The Hope was a part owner in that vessel, and that as such he was personally responsible for the excess of damage beyond the proceeds of the ship, according to the true construction of the act 53 Geo. III. c. 159.

[ \* 158 ] \* *Addams, contra* — Whatever may be the construction of the act 53 Geo. III. c. 159, the statute in question can have no application in the present instance. The proceedings in the cause have been in the usual form by a proceeding *in rem* against the ship itself. Under that proceeding, the court has pronounced its decision in the case, and in accordance with that decision, the owners of The Hope are undoubtedly responsible to the full value of the ship and its appurtenances, for the damage which the owners of The Nelson have sustained. Beyond this limit, in this court at least, they are no further liable; the attempt to ingraft a personal action against the master upon the present decision of the court, is unsustainable in principle, and wholly unprecedented in the practice of the court.

PER CURIAM.

Looking to the general principles upon which the proceedings in this court are conducted, it is, I apprehend, wholly incompetent for the court to ingraft a personal action against the master as part owner of this vessel upon the proceedings which have already taken place in this cause. It may be true, as stated, that the proceeds of The Hope will prove inadequate to answer the full amount of the damage which the owners of The Nelson have sustained. If so, it is undoubtedly a hardship upon these owners; but this circumstance will not entitle me to exercise a jurisdiction in their behalf, which, according to my own impression, I clearly do not possess. I am not aware of any case in which this court, in a proceeding of this kind, has ever ingrafted upon it a further proceeding against the owners,

[ \* 159 ] upon the \* ground that the proceeds of the vessel proceeded against have been insufficient to answer the full amount of the damage pronounced for.

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The John Dunn. 1 W. Rob.

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## THE JOHN DUNN, Place.

July 23, 1840.

Vessel sold under decree of court in a cause of damage, proceeds insufficient. No bail given.  
The owner of the vessel personally condemned for the payment of costs.

THIS was a cause of collision promoted against this vessel, her tackle, apparel, and furniture, for damage done to the brig Tiber, of South Shields, on the morning of the 8th of November, 1839.

The collision took place about two miles northward of Huntcliffe Fort, on the coast of Yorkshire; and in consequence of the injury she had sustained, The Tiber foundered, and was totally lost, together with the cargo laden on board.

A consolidated action was entered by the owners and crew of The Tiber, and also by the owners of the cargo; and an appearance having been given for the owner of The John Dunn, the cause came on for hearing on the 2d session of Easter Term, when the court pronounced for the damage proceeded for, and condemned The John Dunn therein, and in costs.

The vessel was subsequently sold under a decree of the court, and the sum of 732*l.* 8*s.* was brought into the registry as the net proceeds of the sale. The value of the property lost in The Tiber was estimated at 1500*l.*

The court was now moved by *Addams*, on behalf of the owners of The Tiber, and by *Haggard* for the owners of the cargo, to decree interest from the \* time of the collision, and also to condemn the owner of The John Dunn personally on the action; and in support of the application, the case of The Dundee was cited, reported in 1st vol. Haggard's Reports, p. 109.<sup>1</sup>

The motion was opposed on behalf of the owner of The John Dunn, by *Curties*, who submitted — That a distinction existed between the present case and that of The Dundee, inasmuch as in the case of The Dundee bail had been given, and the decree of the court went against the owner, and also the bail, for the damage and the costs.

That in this case no bail had been given, and the act of parliament,

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<sup>1</sup> [Reported also in 2 Hagg. Ad. R. 137, where the decision as to costs will be found.]  
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53 Geo. III. c. 159, limits the responsibility of the owners to the ship and her appurtenances; the proceeds of which had, in this instance, been given up to the injured parties. Lastly, that the court would in effect depart from its original sentence, if it ingrafted upon it a personal monition against the owner of The John Dunn, as prayed.

PER CURIAM.

DR. LUSHINGTON. The general principles which are applicable to cases of this description have been carefully and correctly laid down by Lord Stowell in the case of The Dundee, to which reference has been made upon the present occasion. It has been attempted, however, by the counsel for the owner of The John Dunn, to raise a distinction between the case of The Dundee and the present case, upon the ground that in the case of The Dundee bail had been given to answer the damage and the costs, and the decree went against the owner and also the bail.

[ \*161 ] Now, in my view of it, this circumstance does not constitute any real distinction between the two cases, and for this reason; that the liability of the bail in the case of The Dundee was founded upon the personal responsibility of the owner of that vessel; and unless the owner of The Dundee had been personally liable for the costs of the action, it would have been impossible for the court to have entailed upon the bail any such ulterior consequence. Whatever responsibility attached to the owner of The Dundee must have been governed by the statute, and could not have been increased by the fact of the ship having been bailed, and by the bail undertaking to do more than the statute imposed.

Again, it has been urged that the court, by condemning the owner of The John Dunn personally in the costs of this action, would alter and depart from its original decree; but I do not think that such alteration would be greater than is demanded by the circumstances of the case. The first step in these cases is to condemn the property of the persons doing the injury in the amount of the damage they have occasioned, and of the costs; and the present question could never arise until the property should have been sold, and the proceeds have proved deficient. It is also to be borne in mind, that the owner has appeared and litigated the present case. A different consideration might apply, if no appearance had been given, and the proceedings had been *in pœnam* against the ship; but as the owner of The John Dunn has taken the chance of the litigation, and of a decree in his favor, he is fairly liable for the expenses occasioned by his defence.

Upon the question of costs, therefore, I have no hesitation in

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The John Dunn. 1 W. Rob.

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condemning the owner of this vessel, \*personally, for the [ \*162 ] payment thereof; with respect to the interest claimed from the time of the collision, I do not think the question arises in such a form as would justify me in making an order for it.

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A prohibition was moved for in this case in the Court of Queen's Bench, and a rule *nisi* was granted by the court. In Trinity Term, 1841, the rule was argued by *Cresswell*, Q. C., in support of the decision of this court, *Sir J. Campbell* and *Sir F. Pollock*, *contra*; and upon the 7th of June, 1841, Lord Chief Justice Denman, — present Patteson, Williams, and Coleridge, justices, — delivered the opinion of the court to the following effect.

This case turns entirely upon the construction to be put on the 1st section of 53 Geo. III. c. 159, which confines the liability of ship-owners to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted, or occasioned, without the fault or privity of such owners, to the value of the ship or freight.

The question is, whether this clause includes the costs of recovering compensation, whether by suit against the owners themselves or against the ship, as well as the compensation itself, or whether the owners are personally liable for such costs, although they should exceed the value of the ship and freight.

The words of the section seem to apply more naturally to the actual loss or damage immediately resulting from the thing done, omitted, or occasioned, and as costs are mentioned in the other clauses of \*the act, but not in this, we see no reason [ \*163 ] for thinking that the legislature intended to include them. Great temptation to vexatious litigation would be held out by deciding that they were included; and our opinion that they are not, is strengthened by the express decision of Lord Stowell in the case of *The Dundee*.<sup>1</sup> We agree with that learned lord in the view which he has taken of the statute, and this rule must be discharged. — Rule discharged.

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<sup>1</sup> Ex parte Rayne, 1 Gale & Davidson, p. 374.



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The Tremont. I W. Rob.

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## THE TREMONT, Gray.

January 13, 1841.

In cases of sale under a decree of the court, the transfer of the ship's register is not essential to the validity of the purchaser's title. The title conferred by the court in the exercise of its authority in decreeing the sale, is a sufficient title against the whole world. Monition against the American consul to bring in the register of an American ship, sold at Liverpool in a cause of bottomry, refused.

Proceedings by plea and proof, the ancient law of the Court of Admiralty.

THIS was a case of an American vessel which had been sold at Liverpool under a decree of the court in a cause of bottomry.

Subsequent to the arrest the ship was abandoned by the owners, and the master delivered the register to the American consul at Liverpool, who declined to restore it, upon the ground that having received it in his official capacity, he was bound to send it to the secretary of the treasury of the United States.

The ship was purchased by an American, and he refused to complete the purchase until the register had been given up. Under these circumstances,

*Burnaby* now moved the court for a monition against the consul, calling upon him to show cause why the register should not be brought in; and in support of the motion it was urged — that, upon general principle in cases of this kind, the documents, which [ \* 164 ] were necessary to establish the title in the \* ship, became *de jure* the property of the purchaser at the time when the sale was effected; that by the practice of the court, if these documents were abstracted or withheld, a monition lay as a matter of course to compel their production; and in various cases of British vessels sold under the process of the court, such monitions had been issued and enforced; that there was nothing in the circumstances of the case to warrant a departure from the ordinary rule. The vessel was American property, and had been purchased by a citizen of America; and it did not appear that, by the law of America, the consul was compelled to withhold the document in question. If any such law was intended to be set up, the existence of that law must be legally proved, and the party on whose behalf the motion was made, was at least entitled to know the grounds upon which the delivery of the register was denied.

PER CURIAM.

In all cases of bottomry and salvage, and also in claims for wages,

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The Tremont. · 1 W. Rob.

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which are brought before it, this court possesses an undoubted power to decree a sale of the vessel proceeded against, unless the demand of the successful suitor be satisfied. The jurisdiction of the court in these matters is confirmed by the municipal law of this country and by the general principles of the maritime law; and the title conferred by the court in the exercise of this authority is a valid title against the whole world, and is recognized by the courts of this country and by the courts of all other countries. What then would be the consequence if I were to decree the monition to issue as prayed in the \*present instance? As regards the interest [ \*165 ] of the American purchaser, it would, I conceive, be altogether unnecessary; for I am clearly of opinion that the register is not required, and that his title is sufficiently established by the document issued by the court in decreeing the sale under which the purchase has been made.

On the other hand, I feel that if I were to grant the application, great inconvenience might arise in suggesting a doubt as to the authority of the court to sell and give a good title in future cases of this description. If the monition was decreed, it must issue upon the presumption that by possibility the title conferred by the court would not be perfect unless the register was brought in. What would be the consequence? Upon the present occasion, perhaps, the monition might be obeyed; but if I granted this motion, I could not refuse the interposition of my authority in other cases; and in many instances it might occur that the register had been abstracted or conveyed to other countries; or the party in possession might obstinately refuse to give it up, and submit to an attachment. The result would be, that a distrust of the title conferred by the court might be raised in future cases, and a serious injury be inflicted upon property of this kind, sold under the jurisdiction of the court, by inducing an alarm in the minds of purchasers that something was necessary to confer a valid title beyond the document issued by decree of the court. It has been stated that similar monitions have been issued in the cases of British vessels; but these cases, it is to be observed, are subject to a different consideration. In the case of a British vessel it might be necessary to require the delivery or production of the register \*at the custom-house, and the court has perhaps exer- [ \*166 ] cised authority over subjects of this country. The present case is altogether different. The monition is prayed against the official agent of a foreign government, who asserts that he was acting under the law of his own country in withholding this register. It may be the law of the United States that, the register of this vessel having been delivered into the possession of the consul, he is pro-

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The Lusitano. 1 W. Rob.

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hibited from delivering it up. How am to know this? Under the circumstances of the case, therefore, for the reasons which I have stated, I must decline to grant the present motion.

Motion rejected.

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THE LUSITANO, J. A. Dos Sanctos.

January 13, 1841.

The Court of Admiralty will not interfere to compel the production of a ship's papers, retained by an agent, upon the *ex parte* affidavit of the owners, the case not being an original cause of possession, in which the court would have the power to make an order for the production of the ship's papers as incidental to the cause.

In this case the court was moved to decree a monition against a party in possession of the ship's papers, under the following circumstances:—

The affidavit of the master, to lead the motion, set forth "that The Lusitano, a Portuguese schooner, whilst on a voyage from Lisbon to Havre de Grace, having suffered damage from stress of weather in the British Channel, was compelled to bear up and anchor in St. Helen's Road; that whilst at anchor, G. W., a stranger to the master, came on board and stated to the master that he must go with him to the Portuguese consul at Cowes, and take his ship's papers with him; that the master, believing him to come from the Portuguese consulate, having taken the papers, proceeded with the said G. W.

for Cowes, and when near Cowes Harbor a boat came along—  
[ \* 167 ] side, \* and N. F., also a stranger to the master, from on board such boat, represented himself as the Portuguese consul, and demanded the schooner's papers, which were delivered accordingly; that immediately after he had so delivered the schooner's papers, the master went on shore with the said G. W. and the said N. F., and was taken by them to a house which he supposed to be the house of the Portuguese consul; that he was there introduced to Mr. D., by whom he was persuaded that he should give him an authority to act for the ship; that on the following morning, in consequence of orders given by the master, at the suggestion of Mr. D., the schooner was brought into Cowes Harbor, when the master learned for the first time that he had been imposed upon, and that the said G. W. and the said N. F. were, in fact, only clerks in the service of Mr. D.; that the schooner was thereupon immediately removed by the directions of the master, and taken to Portsmouth, where she

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The Lusitano. 1 W. Rob.

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was put under the protection of the Portuguese consul at that port, and thoroughly repaired." The affidavit also further set forth, "that at the time of her removal, and subsequent thereto, repeated application had been made to Mr. D. to restore the ship's papers, but without success; that the schooner is now ready to receive her cargo, but the master is unable to reship the same and to proceed on his voyage without obtaining possession of the said papers; that a great part of the cargo is of a perishable nature, and a serious injury will accrue in consequence to the owners of the cargo, and also of the ship, by the detention of the schooner at Portsmouth, &c."

*Haggard*, in support of the motion, submitted — That the ship's papers had been obtained from \* the master by a palpable misrepresentation, and that, by their retention, the owners were virtually deprived of their property in the vessel, as she could not proceed to complete her voyage without them; that although the master was a subject of Portugal, the person in possession of the papers, and against whom the monition was prayed, was a British subject, and within the jurisdiction of the court. The case was therefore fairly entitled to the interposition of the court; and although no precedent could be mentioned precisely in point, upon principle the court might safely entertain the motion under the equitable authority with which it was invested.

PER CURIAM. I should be much disposed to assist the owner of this vessel under the circumstances set forth in the master's affidavit; but the following difficulty suggests itself to the mind of the court in relation to the application which is now made, namely, that it is, I apprehend, an ordinary practice for the masters of foreign vessels to deliver their ship's papers to agents in this country, upon their arrival. If, therefore, monitions might be demanded in all cases of this kind, the court would be involved in the investigation of many questions upon which it would be wholly incompetent to decide. Another difficulty also arises from the consideration that the present case is not an original cause of possession in which the court would have the power to make an order for the production of the ship's papers, as incidental to the cause. I am asked to decree the monition upon an *ex parte* affidavit; and if I granted the application, I do not see that I have any authority \* to enforce the monition, if [ \* 169 ] the party against whom it should be taken out were to decline to bring in the papers, or fail to show adequate cause. Unless I was previously satisfied upon this point, however strong the case might be, and this case is undoubtedly a strong case *prima facie*,

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The Minerva. 1 W. Rob.

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I should be reluctant to issue the process in question. I will take time to consider the application.

Upon a subsequent court day the court finally disposed of the motion, with the following observation :— Having considered this application since the question was last before me, I regret to say that I cannot render any assistance to the party on whose behalf the motion has been made. I cannot, in any fair view of the case, consider it as a cause of possession ; and the vessel, moreover, is a foreign vessel, and Mr. D., the party withholding the papers, may possibly have a lien upon them, which might raise a question of debt ; and this court, in dealing with such question, would be exceeding its jurisdiction.

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### THE MINERVA, Crawford.

January 13, 1841.

In proceedings in the Court of Admiralty, the suitor is entitled to choose his own mode of proceeding, whether by act on petition, or by plea and proof.  
 Libel in a case of bottomry admitted.

THIS was a question as to the admissibility of a libel in a cause of bottomry.

The suit had been commenced by plea and proof, and a preliminary objection was taken to the form of the proceeding by *Addams* and *Harding*, on behalf of the owners, upon the ground that it was objectionable in principle, and a departure from the established practice of the court in cases of this kind. That the usual form of proceeding was by act on petition and affidavit, and the admission of the libel would entail a hardship upon the owners of the vessel [ \*170 ] \*proceeded against, and would also establish an inconvenient precedent in future cases. That bonds of bottomry, it was well known, were most frequently granted by the masters of ships in the ports of countries far distant from the residences of the owners, if, therefore, suits for their recovery might hereafter be brought at the option of the asserted bondholder, in the mode now attempted to be introduced, the consequence would be, that, in a majority of cases of this description, the evidence must be taken by commission abroad, and a great increase of delay and expense must of necessity be occasioned. Such would be the result in the present case, if the court should admit the libel ; and, at all events, the owners of The

Minerva were entitled to demand security for the costs of the proceeding.

In support of the libel, *Queen's Advocate, contra*,— That, in point of principle, it was obvious that a proceeding by plea and proof was a convenient form of proceeding, and, in many cases, indeed, was indispensable to elucidate the truth of the facts set up on the one side and the other, by compelling the evidence of reluctant witnesses, and the answers of the parties in the cause, which could not be done by the more summary form of an act on petition. That the ancient mode of conducting all suits in the Court of Admiralty, was by libel and proof, and, although in the modern practice of the court, the more summary form of act on petition and affidavit had undoubtedly prevailed, it was still open to the suitors to elect their own mode of proceeding, and that their right to such election had been recognized by the court in the cases of *The Westmoreland* and *The Sydney* case, and other decided cases.

\* PER CURIAM.

[ \* 171 ]

It is, I think, essential to the furtherance of justice in these causes, that the parties in the suit should be at liberty to choose their own mode of proceeding, whether by act on petition, or in the more solemn form of plea and proof, and for this reason, that many cases might occur, in which, without the exercise of this liberty, they would be wholly deprived of the means of proof necessary for the establishment of their case. For instance, as it has been observed by the *Queen's Advocate*, where the evidence of reluctant witnesses or the answers of the adverse parties is important to elucidate the case, it is clear that these could not be obtained if the proceedings were confined to an act on petition, because it is notorious that in an act on petition the testimony is altogether voluntary, and the court has no power to compel a man to make an affidavit. Again, similar difficulties might arise in cases of fraud, where, in order to detect the real truth and foundation of the transaction, it may be necessary to have the opportunity of cross-examining the witnesses that are produced. If, therefore, the objection that has been taken to the admission of the libel rested simply with the discretion of the court, I should be disposed to reject it, but I apprehend that it is not a matter of option on my part. Cases have been cited by the learned counsel, in which the suitor's right to proceed by plea and proof has been recognized by my predecessors in this chair, and I myself recollect a case which came under the consideration of Lord Stowell, in which it was expressly stated by that learned judge, that the proceeding by plea and proof was the

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The Wilsons. 1 W. Rob.

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ancient law of the Court of Admiralty ; that the more summary proceeding by act on petition and affidavit was introduced for the sake of convenience alone, and that it was a matter of right in any suitor, subject to the liability for costs, to choose his own mode of proceeding. The case to which I refer was a case of collision, but I well recollect that the observations of Lord Stowell were general, and not confined to cases of collision only. Upon principle, therefore, and also upon the precedent of former decisions, I am clearly of opinion that the bondholder in this suit is at liberty to proceed in the mode he has adopted, namely, by libel, and the examination of witnesses. If, in so doing, any unnecessary expense or hardship shall be entailed upon the owners of *The Minerva*, I shall feel it my duty to protect them from any such burden, by holding the bondholder responsible for the costs thereof, even although I should ultimately pronounce for the validity of the bond.

As I am bound to presume that the bond was duly executed, I cannot make an order of security for the costs until I see some special reason for so doing.

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### THE WILSONS,<sup>1</sup> Hunter.

January 13, 1841.

The officers and crew of king's ships not debarred from suing as salvors. For risk and labor encountered in a salvage service, they are entitled to remuneration upon the same footing as other salvors.<sup>2</sup>

Apportionment of salvage awarded.

Mortgagee of the vessel, sold by decree of court, allowed to bid as a purchaser when the ship was put up for sale.

In this case, *The Wilsons*, of Sunderland, of 223 tons burden, whilst on a voyage from Leghorn to St. Petersburg, with a cargo of Italian marble and paintings, struck upon the Long Sand on Essex coast, on the morning of the 7th May, 1840. Endeavors were made during the day by the officers and crew of her Majesty's steamer *The*

*Boxer*, assisted by the crews of seven smacks, to get the vessel [ \* 173 ] set off, but without success. On the following morning, a

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<sup>1</sup> [Reported on another point, 1 Notes of Cases, 115.]

<sup>2</sup> [The *Jodin*, 8 Notes of Cases, 140 ; The *Mary Ann*, 1 Hagg. Ad. R. 158.]

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The Reward. 1 W. Rob.

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considerable portion of the cargo having been taken out by the exertions of the same parties, The Wilsons was towed off the sand by The Boxer, and safely carried into Ramsgate Harbor by some of the smacksmen. The claim of The Boxer to share in a salvage remuneration was opposed by the owners, upon the ground that she was a vessel fitted and maintained at the public expense, and was, therefore, bound to have rendered her assistance gratuitously under the circumstances of the case.

For the officers and crew of the Boxer, *Addams and Robinson*.

For the smacksmen, *Dodson and Harding*.

For the owners, *Nicholl and Jenner*.

The court was of opinion, that for personal risk and labor encountered in a salvage service, the officers and crews of king's ships are entitled to salvage remuneration upon the same footing as other salvors.

1800*l.* awarded, and the following apportionment directed: 1000*l.* to the officers and crew of The Boxer; 800*l.* to the smacksmen. The appraised value of the Wilsons and cargo was 7,384*l.*

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A sale of the vessel and a part of the cargo was subsequently decreed by the court, and an application was made to the court on behalf of a mortgagee of the vessel, that he might be allowed to bid as a purchaser, when the ship was put up for sale.

The application granted.

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\* THE REWARD, Hogg.

[ \* 174 ]

January 21, 1841.

Distinction between a salvage and a towage service. Towage service confined to vessels that have received no injury or damage.

Salvage awarded.

Affidavits sworn before masters extraordinary in Chancery must contain in the jurat the insertion of the place where they were sworn.

In this case The Reward, of 325 tons burden, whilst on a voyage from London to Jamaica, encountered a violent gale, and drove upon



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The Reward. 1 W. Rob.

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the Maplin sand in the evening of the 27th November, 1840. On the following morning, the weather having moderated, she was backed off the sand by means of the sails, with the loss of her two best anchors and cables, and the starboard end of the windlass and bulk-head carried away. She was proceeding for Sheerness to repair the damage when she fell in with the steam-tug The Nelson. The services of The Nelson were accepted by the master, and The Reward was towed back to the West India Docks, where she arrived about five, P. M., of the same day.

In the opening of the argument, the admission of three affidavits brought in by the salvors was opposed by the counsel for the owners, upon the ground that they had been sworn before a master extraordinary of the Court of Chancery, and the insertion of the place where the affidavits had been sworn was omitted in the jurat.

*Burnaby* and *Robertson*, in support of the objection, referred to an order of court made by Lord Chancellor Clarendon, A. D., 1661,<sup>1</sup> and submitted :

That where a delegated authority is conferred by commission from a court of law, the exercise of that authority must be governed by the orders and regulations of the court from which it emanates. [ \* 175 ] If certain forms are directed by the court to be observed by its commissioner in the discharge of his functions, it is the duty of such commissioner strictly to adhere to the forms so appointed. It is imperative upon him to observe these forms ; and upon the due observance of them on his part must depend the validity of the acts done by him in virtue of his commission. That the order of the Court of Chancery, which had been neglected by the master in taking the affidavits in question, was not a mere order of form, indifferent in itself, but one of the greatest importance ; because it was well known that the authority of the masters extraordinary was confined within certain limited distances, and any affidavit sworn by them beyond these limits was a mere nullity, and could not be received as legal evidence. That in the case of *The King v. The Justices of the West Riding of Yorkshire*,<sup>2</sup> the affidavits filed by the justices in answer to the rule *nisi* were rejected by the Court of King's Bench upon this very ground, namely, that they had been sworn before a commissioner appointed by the Court of King's Bench, and the order of the court, that the name of the place where sworn should be inserted in the jurat, had not been complied with.

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<sup>1</sup> Beames's Gen. Orders of High Court of Chanc. p. 212.

<sup>2</sup> Maule & Sel. vol. iii. p. 494.

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The Reward. 1 W. Rob.

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*Queen's Advocate* and *Addams, contra*. In the case of *The King v. The Justices of the West Riding of Yorkshire*, the insertion of the place where the affidavits were sworn had been expressly ordered by the Court of King's Bench, and the affidavits were taken before a commissioner appointed by that court. In this case the affidavits were taken before a commissioner of another court, \*and no directions as to their form were prescribed by the [ \*176 ] Court of Admiralty: neither had it been intimated by the court that it would not receive such documents unless the name of the place where they should be sworn was inserted. On the contrary, in a variety of cases similar affidavits had been received by the registrar, and admitted as evidence by the court, in which the insertion of the place where sworn had been altogether omitted.

PER CURIAM.

I think the court is bound to sustain the objection which has been raised in the present instance. The affidavits in question purport to have been sworn before a master extraordinary in chancery, who derives his authority solely from the appointment of that court. Upon the face of these affidavits, it appears that the order of the Court of Chancery has not been complied with in the form in which they have been taken. It is clear, therefore, that they would not be received as admissible evidence in proceedings in the Court of Chancery, and it would, I conceive, be an anomaly if I should admit them as evidence in this court. Another reason why they should not be admitted arises from the circumstance adverted to by the counsel for the owners, namely, that the authority of the masters extraordinary in chancery is confined within certain limited distances. How is the court to ascertain whether these affidavits have been properly taken within the prescribed distance, unless the fact is duly certified in the *jurat*? They may have been taken by the master beyond the limits of his authority; in that case they would be a mere nullity. However false their depositions might be, \*the wit- [ \*177 ] nesses could not be prosecuted for perjury. Would it not then be detrimental to the attainment of justice, that such evidence should be received, which, supposing it to be wilfully false, should be of a kind, or taken in a manner, that would not stand the test of inquiry in a criminal court? For these reasons I must reject these affidavits; and I direct the practice in the registry to be altered in future; at the same time, as it has been stated to the court, that similar documents have been heretofore received as evidence, I shall give the salvors the opportunity of having the affidavits resworn.

The objection was afterwards waived by the counsel for the own-

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The Harmonie. 1 W. Rob.

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ers, and the case was heard upon its merits; and in delivering its judgment the court observed —

“In the course of the argument it has been contended by the counsel for the owners, that the service which has been rendered in this case is a mere towage service; and that the sum of 17*l.*, which has been tendered, is a sufficient remuneration, being at the rate established for towing a vessel from the Nore to London, according to a printed scale of the company to which The Nelson belongs. In my judgment, the service of the salvors is a service of a higher nature. I apprehend that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident.”

The sum of 80*l.* awarded. The value of the ship and cargo was 8,000*l.*

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[ \* 178 ]

\* THE HARMONIE, Prahm.

February 9, 1841.

The right of a tradesman to retain the materials of a ship left in his possession for the purpose of repairs until the repairs are paid for, does not extend against the authority of the Court of Admiralty, when the ship is in possession of its officer under a warrant of the court.<sup>1</sup>

Monition against a sail-maker to bring in the sails of an arrested vessel directed to issue.

IN this case the Swedish ketch, The Harmonie, was arrested by warrant of the court, under the provisions of the act 3 & 4 Vict. c. 65, for necessities supplied to the said vessel, amounting to 25*l.* 16*s.* 5*d.* No appearance being given for the owners of the vessel, the usual defaults were granted, and the *primum decretum* was signed.

In executing the commission of sale decreed by the court, it was ascertained that the sails belonging to the vessel were in the possession of Andrew Smith, a sail-maker, who refused to give them up, upon the ground that the sails had been left with him, prior to the arrest of the vessel, by Prahm, the master, in order to their being repaired; that such repairs had been effected, and that the charges for the same, amounting to the sum of 18*l.* 17*s.* had not been paid.

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<sup>1</sup> [The Phebe, Ware's R. 354; The Harmonie, 1 W. Rob. 179; Certain Logs of Mahogany, 2 Sumn. 589; Taylor v. The Royal Saxon, Wallace, Jr. R. 311.]

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The *Harmonie*. 1 W. Rob.

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Under these circumstances — *Addams* moved the court to decree a monition to issue against Andrew Smith, to deliver up the sails to the custody of J. S., the person in charge of the ship under the warrant of the court.

The motion was opposed by *Nicholl*, who submitted — That the sail-maker had a lien upon the sails; and, under the general law, he was justified in retaining them in his possession until the amount of the repairs should be paid.

PER CURIAM. Undoubtedly the sail-maker has a lien upon these sails to the amount of the repairs he has effected; \* and [ \* 179 ] under the general law he would be justified in retaining possession of them till his debt is paid, against the owners or others seeking to dispossess him. As against the authority of this court, however, he has no right to detain them when the ship is in possession of its officer, under a warrant from the court. The court can protect the sail-maker in his just rights.

Monition directed to issue.

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THE HARMONIE, Prahm.

February 9, 1841.

An attachment decreed against a harbor master for seizing and carrying off for non-payment of harbor dues portions of the rigging of the ship whilst in the custody of the officer of the court.<sup>1</sup>

THIS was an application in the same case, for an attachment to issue against Samuel Browse, for unrigging and carrying away part of the stores of the vessel whilst in possession of the officer of the court. The affidavit to lead the motion set forth — That on the 2d day of January, Samuel Browse, the lessee of the tolls of the harbor of Brixham, accompanied by Samuel Saunders and others, came on board *The Harmonie*, and demanded payment of the sum of 7l. 10s. for harbor dues; that it was thereupon stated to the said S. B. that the deponents could not pay them, but that an application must be made to the Admiralty Court upon the subject; that the said S. B. took no notice of such statement, but notwithstanding that the vessel

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<sup>1</sup> [The *Harmonie*, 1 W. Rob. 178.]

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The Deveron. 1 W. Rob.

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was then under arrest by the authority of the court, and that a commission for the sale thereof had issued from the court, immediately, with the assistance of the said S. Saunders and others, he commenced cutting away part of the rigging of the vessel, and carried away therefrom in two carts, which he had provided for such pur-

[ \* 180 ] pose, the \* following articles belonging to the vessel, namely, the best bower anchor, three booms, two gaffs, mast of the jolly-boat, eight pieces of rope, being a portion of the rigging which they had cut away together with one mooring stern fast; that such the conduct of the said S. B. is very prejudicial to the sale of the vessel, and that the articles taken by him were included in the printed inventory of the intended sale of the stores and materials of the vessel; that the said S. B. was fully aware, as deponent believes, of that fact, as also of the vessel being under arrest by authority of the Court of Admiralty, and of the appointment of the commission for the sale thereof, &c.

Attachment directed to issue as prayed.

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### THE DEVERON.

March 5, 1841.

In apportioning a salvage remuneration between the owners and crew of a salving vessel, the share of the owners will not be increased by the probable vitiation of a policy of assurance effected upon the ship.

In directing an apportionment, the court will consider every vessel as uninsured.

THIS was a question as to the apportionment of a salvage remuneration for services rendered to the brig Deveron of Glasgow, by the master and crew of The Eleanor.

The vessel was discovered by the salvors near the great bank of Newfoundland, on the morning of 30th November, 1840, and when boarded, she was found to be laden with timber, but wholly abandoned, without chart or compass, or any documents on board, with five feet water in the hold, and the rudder carried away. A temporary rudder was constructed by the salvors, and the mate and five of the crew were put on board from The Eleanor, and under them she was safely navigated to the port of Plymouth, where she arrived on the 2d of January, 1841.

The agreed value of the ship and cargo was 3,200*l*., and [ \* 181 ] a moiety of that sum was tendered by \* the owners of The

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The Deveron. 1 W. Rob.

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Deveron, and accepted by the salvors. A question was now raised between the owners and the master and crew of *The Eleanor*, as to the distribution of the sum tendered which had been brought into the registry.

*Addams* and *Robinson*, for the owners, urged the probable risk of damage *The Eleanor* had incurred by the subtraction of the mate and five of her crew, and the consequential loss which the owners had sustained, in the delay of the arrival of their ship and cargo in England. It was also urged that an insurance had been effected upon the *Eleanor* by the owners; and if that vessel had been lost, the policy of insurance might have been vitiated by the circumstance of *The Eleanor* having been short-handed. The following cases of apportionment were cited: *The Waterloo*, 2 *Dodson*, 433; *The Howard*, 3 *Haggard*, 256; *The Martha*, *Ibid.* 434; *The Columbia*, *Ibid.* 428; *The Albion*, *Ibid.* 254; *Defiance*, *Ibid.* 256; *Hope*, *Ibid.* 423.

*Haggard* and *Robertson*, *contra*, for the master and crew of *The Eleanor*.

The court directed the following apportionment: 700*l.* to the owners of *The Eleanor*; 200*l.* to the master; 200*l.* to the mate; 300*l.* to the five seamen who navigated *The Deveron* to Plymouth; and 200*l.* to the rest of the crew, who remained on board *The Eleanor*.

In delivering its sentence, the following observation was thrown out by the court:—

“It has been urged, in aggravation of the risks incurred by the owners of *The Eleanor* in this case, \* that their ves- [\* 182 ] sel was insured, and, if she had been lost, the policy of insurance might have been vitiated, by the withdrawal of the mate and the five hands who were put on board *The Deveron*. In my view of it, this circumstance cannot be allowed, in any degree, to influence the decision of the present question. It would, I conceive, be productive of great inconvenience, if, in deciding these cases, I should enter into the consideration whether a policy of insurance would be vitiated or not. The consideration would often involve questions of considerable nicety, and would impose no slight difficulty upon the court. Upon this point I have already expressed my opinion in former instances; and I shall continue to adhere to the rule I have heretofore adopted, namely, in apportioning the remuneration in salvage causes, I shall consider every vessel as uninsured.”

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The Harriett. 1 W. Rob.

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## THE HARRIETT, Bulmer.

March 19, 1841.

Where a light vessel, with the wind free, meets a laden vessel, close-hauled, it is the duty of the former to give way, and the latter is to keep her course.

Liability of bail. Sureties are only bound to the extent of the obligation expressed in their bond, but not beyond its plain and obvious meaning.

Any departure from the original agreement, by private arrangement between the principal and the obligee, will cancel the liability of the sureties. Once discharged, the obligation can never be revived in its former shape against them.<sup>1</sup> Bail dismissed.

THIS was a cause of damage by collision, promoted by the owners of The Woodpark against the brig Harriett, her tackle, apparel, &c.

The act on petition of The Woodpark set forth, that The Woodpark sailed from the port of Tyne on the 29th September, 1840, manned with a crew of nine persons, including the master, and laden with a cargo of coals, bound to Gravesend; that, at about eleven, P. M., of the 1st October, there being then on deck the master and the whole of the crew, a ship (which proved to be The Harriett, the vessel proceeded against) was seen on her lee bow, at the distance of about half a mile; that The Woodpark was [ \* 183 ] sailing, at the time, at the rate of \* about three knots an

hour, having her whole sails set, and keeping her reach starboard tack, close-hauled, the wind being W. N. W., and the vessel which was observed approaching was seen to be in ballast, and bearing in the direction of The Woodpark's bow, and that her course was N. E.; that the said ship was hailed to bear up by the mate of The Woodpark, but no answer was returned, nor any notice whatever was taken of such hailing, until the said vessel came within about her own length from The Woodpark, when her helm was altered to the starboard, and she ran directly into The Woodpark's larboard bow, striking with such violence as to stave the larboard bow down to the water's edge, and to break her stern breast hooks, knight timbers, and deck beam, besides doing her other serious damage, &c.; that the wind, at the time, being W. N. W., and the course of The Harriett N. E., she had the wind two points abaft the beam, and consequently had the entire command of the sea, under which circumstances it was clearly the duty of those on

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<sup>1</sup> [S. C. 1 Notes of Cases, 325.]

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board of her to have put her helm a-port, in order to pass to leeward of The Woodpark, instead of which they put her helm a-starboard, and thereby wholly and entirely occasioned the collision in question in the case.

On the part of The Harriet it was alleged, in reply — That it was excessively dark on the night of the 1st October last, and, at the time when the collision took place, The Harriett was on the larboard tack, and her course was N. E., and the wind N. W., and not W. N. W.; that the whole of the crew were on deck, J. D., the carpenter, being on the look-out forward, standing on the larboard side of the forecastle, and S. S., the mate, and one of the crew \* being also on the forecastle on the look-out; that J. D., [\* 184 ] the carpenter, was the first of the crew who discovered The Woodpark, which was at such time at the distance of about three or four ships' length on the lee bow of The Harriett; that the said J. D. immediately sung out to the man at the helm of The Harriett, "Put your helm hard down; luff;" that the order was instantly attended to, and The Harriett came to directly, and her headsails took her aback; that The Woodpark would, if she had kept her course, have gone clear of The Harriett, but that she then put her helm down, and came across the course of The Harriett; that immediately on observing this, the master of The Harriett ordered the helmsman to put the helm hard down, with the view of coming round on the opposite tack, but that The Woodpark directly came in collision with her sails, full at the time, striking The Harriett on the starboard bow, her bowsprit being under the bowsprit of The Harriett, and the stays of The Woodpark lay locked in The Harriett's bowsprit and yards; that no hailing was heard by any of the crew of The Harriett, nor any thing to indicate the approach of The Woodpark, until she was discovered as aforesaid, and that the distance at which she was first seen by J. D., the carpenter, was the extreme distance at which a vessel would be seen in the night, and at the time when the collision took place, by persons keeping a good and proper look-out; that there was a good and proper look-out kept on board The Harriett at the time of the collision, and, under the circumstances of the case, the means taken by The Harriett to avoid a collision were proper and seamanlike, and that the accident arose from the \* conduct of those on board The Woodpark, in altering her [\* 185 ] course as she approached The Harriett, &c., &c.

The case was argued before Trinity Masters by — *Addams* and *Curteis*, for the owners of The Woodpark.

*Queen's Advocate* and *Harding*, *contra*.



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The Harriett. 1 W. Rob.

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PER CURIAM.

DR. LUSHINGTON. The facts of the case have been fully discussed in the arguments of the learned counsel who have addressed the court, and they require but few observations from the court upon the present occasion. In the course of the argument, it has been admitted by the counsel for The Harriett, that there was a deviation on the part of that vessel from the ordinary rule of navigation in the present instance, but such deviation, it has been argued, was justified by the particular circumstances of this case. Now as I consider it of the highest importance that the rule of navigation in question should be generally known and attended to, I may here state what, under the circumstances of the case, is my own impression with respect to such rule. I conceive the rule to be this: that where a laden vessel, being in the place or situation in which The Woodpark is stated to have been, is proceeding from the north, with the wind at N. W. or W. N. W., and a light vessel is approaching to the north on the larboard tack, the latter is to go before the wind and port her helm, and the other is to keep her course. Such is admitted to be the rule by the counsel for The Harriett, but they have contended that the circumstances of this particular case form an exception to the rule. Now,

whoever sets up an exception to a general rule so important [ \* 186 ] \* as this, is bound to prove that facts and circumstances occurred which rendered the rule itself no longer applicable.

On the part of The Harriett, therefore, such facts must be shown as will justify the departure from the general rule, and the adoption of the course which has been pursued by the master and crew of that vessel upon the present occasion. What then are the facts of the case as alleged on the one side and on the other? The first point in dispute is as to the quarter of the wind. On the part of The Woodpark, it is asserted to have been W. N. W.; on behalf of The Harriett, it is stated to have been N. W. Now the only effect of this difference in the respective statements, I apprehend would be this, that assuming The Harriett's account to be correct, she would have had two points free; on the other hand, assuming The Woodpark's statement to be correct, she would have had nearly four points in her favor. But whether the wind was W. N. W. or N. W., it was, I apprehend, equally the duty of The Harriett to have ported her helm, and not put it a-starboard. Again, it has been stated in support of The Harriett's case, that the night was exceedingly dark, and this fact is not in any degree controverted in the cause, but admitting the fact to be as stated, that the night was so dark that the persons on board The Harriett could only see a very short distance from the vessel; this circumstance would only render it the more incumbent upon the crew of

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The Harriett to keep a good look-out, and not to depart from the general rule, unless compelled to do so by absolute necessity. Another fact is stated on behalf of The Harriett, which appears to me of much greater importance, namely, that when The Woodpark was first perceived from the \* deck of The Harriett, she was seen [ \* 187 ] on the lee side, and the vessels were so close upon each other, that if she had ported her helm she would have run down the other vessel. The fact, gentlemen, (addressing the Trinity Masters,) that The Woodpark was so seen on the lee side of The Harriett is directly denied by The Woodpark, and it has been pressed in argument by the counsel for that vessel, that it was impossible she could have been seen in such position from the deck of The Harriett. Upon this point, I must leave it entirely to your nautical experience to determine whether, in the direction in which the two vessels were respectively sailing, the persons on board The Harriett could have seen The Woodpark on her lee side or not. Lastly, it has been urged on behalf of The Harriett, that the accident was entirely occasioned by the conduct of the persons on board The Woodpark in putting her helm a-port, and by so doing, coming directly down upon The Harriett. In order to arrive at this conclusion, every statement on the part of The Harriett must be assumed to be correct, and every statement on behalf of The Woodpark to be false, because it is expressly averred on behalf of The Harriett, that the accident arose from The Woodpark's changing her course ; whilst, on the other hand, it is contended for The Woodpark, that she kept her course and did not alter it in the slightest degree.

The questions then, gentlemen, for your consideration, are the following: First, Whether The Harriett pursued a proper course in star-boarding her helm ? and secondly, assuming the statement of The Woodpark to be true, whether the master of that vessel was right in not altering his course ?

\* The Trinity Masters were of opinion, that, under the [ \* 188 ] circumstances of the case, The Harriett having the wind free, and The Woodpark being close-hauled, it was the duty of the former to have given way, and that the accident was occasioned by The Harriett in not having put her helm a-port.

Damage pronounced for with costs.

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In Easter term, 1842, a further question arose in this case with respect to the liability of the bail for the amount of the damage and the costs awarded, the owner having become a bankrupt. The cir-

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cumstances under which the question arose are fully noticed in the judgment of the court, and for the sake of convenience, the judgment is published in the following report, although out of its proper order in point of time.

The question was argued by *Haggard*, on behalf of the bail.

By *Addams* and *Curteis*, for the owners of The Woodpark.

#### JUDGMENT.

DR. LUSHINGTON. The questions which have been raised in the present instance are fortunately of rare occurrence. The court is not very familiar with the doctrines which they involve; and when they do occur they impose some difficulty upon the court, and require great deliberation as to the facts, circumstances, and principles upon which they are to be decided. The facts of the case before me are shortly these; The Harriett was arrested in a cause of damage, at the [ \* 189 ] instance of the owners of The Woodpark. Bail was \* given in the usual form; and in March, 1841, the cause came on for hearing, when the court pronounced for the damage sued for, and condemned the owners of The Harriett in the damage and the costs of the proceedings, referring the amount to be settled by the registrar and merchants in the usual manner. According to the minutes of the court, it appears that nothing further was done in the case until the 6th of July, when the proctors for the party suing alleged, and the proctor for The Harriett admitted, the damage in question to amount to the sum of 360*l.*; and at the same time a monition was extracted against the owner of The Harriett and the bail for the payment thereof. If I had been apprised of the facts at the time, I should have doubted whether a monition against the bail could properly have been decreed. It further appears by the minutes, that upon the default-day, the 4th of August, the monition was returned personally served upon the several parties, and an attachment was prayed against them. The motion was heard by the Dean of the Arches, sitting for the judge of this court, and he directed it to stand over to the next default-day. A bill of costs was then prorected by the proctor for the party suing, which was taxed as usual, and a monition for the payment of such costs was decreed against the owner of The Harriett and her bail. This monition was returned duly executed upon the 8th of September; and upon the same day the proctor for the party suing alleged the owner of The Harriett to be a bankrupt and prayed an attachment against the bail, for payment of the amount of damage and costs. The surrogate before whom the motion was made again

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directed the matter to stand over; \*and upon the 4th [\*190] of November, the court was again moved to decree an attachment against the bail, for disobedience of the monition for payment of the damage and costs.

An appearance was then given for the bail, who prayed to be heard on petition in objection to the attachment; and upon the 12th of November, an act on petition was brought in on their behalf, alleging that they were released from their liability by the effect of the proceedings which had taken place upon the 6th of July. To this petition an answer was returned by the owners of The Woodpark, denying that they were in any manner discharged from their liabilities as bail, and praying in the conclusion of the reply, that the bail might be compelled to the due payment of the amount of the damage and costs pronounced for, and also condemned in the further costs of the act on petition. It may now be expedient to state the ground upon which it is contended that the bail was released by what took place upon the 6th of July. The fact relied on is this, that the owners of The Woodpark, having procured a decree for the damage, and a reference to the registrar and merchants, to ascertain the amount, proceeded to settle that amount by private negotiation, without at all referring to the bail; and that the bail were not informed of such negotiation until after the 12th of June, when a letter was addressed to Mr. Marshall, one of the bail, of the following tenor:

“Dear Sir,—After a great deal of trouble I have at last got the damage matter for Woodpark and Harriett settled by payment of 369*l.* at two, four, and six \*months from this date, [\*191] for notes payable with you, and your joining your name with mine. You will, therefore, much oblige me by joining in the same, and I will provide in time for them at maturity.

“Remaining yours, &c.”

To this letter Mr. Marshall, in reply, sent the following answer:

“Dear Sir,—I have this morning received your letter of the 11th instant, asking me to join you in security for the payment of 369*l.*, at two, four, and six months, for the claim of the ship Woodpark, for damage done by The Harriett, and to-day Mr. W. called upon me with the bills. I really think, before you drew the bills, it would have been the correct course to have asked me whether I would do so. The fact is, transactions of this nature are not what I like. You must, therefore, permit me to decline joining you in the security.”

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It is sworn, and not denied, that this was the first intimation which Mr. Marshall received of the negotiation which had been effected out of court; and Mr. Gore, the other bail, swears that he knew nothing of the proceedings which had taken place, until he was served with the monition in 1841.

On behalf of the bail it is also further alleged, that if the reference to the registrar and merchants had been duly made, and the ordinary steps had been adopted, there was ample time for the party suing to have enforced the payment of the damage and costs from Gillies, the owner of The Harriett, before he became a bankrupt. Under

this state of facts, I have now to determine upon the law to [ \* 192 ] be \* applied to the circumstances of this case; and the first inquiry must be, what is the principle of law which I must take as my guide? The answer is: the same principle which applies in cases of principal and surety; and in applying this principle to the present case, I must be governed by the same rules which prevail in the courts of law and equity; for I know of no general principles of maritime law which differ from the rules of other courts. If a court of equity would relieve, and a court of law could not, I consider that it would be my duty to afford that relief under the circumstances of the present case. The jurisdiction which I exercise is an equitable as well as a legal jurisdiction, and I must relieve the parties in this suit, if they are entitled to be relieved in law or in equity. It is, therefore, unnecessary for me to enter into a distinction whether the relief is at law or in equity. Having thus considered and settled what is the law by which my judgment must be governed upon the present occasion, I must now refer to the terms of the obligation into which the sureties in the case have entered. The tenor of such obligation is a matter of the first importance, because it is only by virtue of that obligation that sureties are bound at all; and they are only bound to the extent of it, but not beyond its plain and obvious meaning. The obligation of the sureties in the present case is expressed in the bond in the following words: "to answer the action commenced, and to bring forth James Gillies into judgment to abide the hearing of the cause, and likewise to pay what shall be adjudged, with the expenses."

A doubt might possibly be raised in some cases as to the [ \* 193 ] construction of this obligation; and it \* might be said that it was confined to the mere bringing forth of Gillies into judgment, and that he should pay what was adjudged against him. A further question might also be raised, how far it was necessary to prosecute the principal in the first instance before proceedings could be instituted against the bail. Upon the present occasion, however, I

am of opinion that no such question can arise, and for this reason, that Gillies, the principal, being a bankrupt, the money cannot be recovered from him; and if the sureties were liable in his default of payment, it would in no degree avail them that proceedings should be instituted against him in the first instance; as far as they are concerned, the result would be the same in point of law. Now, such being the obligations of the sureties proceeded against in this case, the first question which I must consider is this,—are they, under the circumstances of the case, liable to be attached for not performing what they have undertaken to do? With respect to the non-payment of the damage awarded, it is perfectly clear that the bail are not bound to pay any thing not adjudicated by the court; it is also equally clear that the sum of 360*l.*, the amount claimed for the damage in question in this case, was fixed by private settlement and agreement, and was not adjudged by the court. Upon this part of the case, therefore, I entertain no doubt whatever that an attachment could not be decreed against the bail for not paying the damage so agreed upon. All that was done upon the 6th of July, as regards the monition against the bail was an imprudent proceeding upon the part of the party suing; and, as I have already observed, if the facts had been fairly within the knowledge of the court

\* at the time, the court would have felt great difficulty and [ \* 194 ] reluctance in allowing the decree to issue at all. It remains to be considered, in the next place, whether I could decree an attachment against the bail in the present instance for the non-payment of the costs which have been incurred in the proceedings. Here, again, I must refer to the terms of the obligation, which is to pay what may be adjudged, and expenses. It is clear, therefore, that no obligation is expressed in the bond for the payment of costs separate and distinct from an adjudication for damages; and being so, it follows that no adjudication having been made of the damages sustained by the owner of The Woodpark in this case, an attachment for costs cannot issue.

The observations I have already made dispose of so much of the case as relates to the prayer with which Mr. Whitehead concludes his reply to the act on petition, namely, that the bail may be compelled to the due payment of the amount of the damage, and the costs which have been incurred. What I have said, however, although it disposes of the question of attachment, does not dispose of the whole case; it does not dispose of the general liability of the bail. The prayer of the bail, as set forth in their act on petition is, that they should be discharged from their liabilities, and dismissed from the effect of the acts done upon the 6th of July.

This prayer, I must say, is not very carefully or skilfully worded; for if the liability of the bail is once discharged, it follows, as a matter of course, that they would be entitled to be dismissed altogether. As the whole question of liability has been argued at the bar,

I will now proceed to express my opinion whether the bail [ \* 195 ] are discharged from \* liability upon the present occasion; and in so doing, I will endeavor to state the legal questions which appear to me to arise, or which have been discussed in the arguments of counsel. It has been urged, that by referring the amount of the damage sustained to private settlement, instead of going before the registrar and merchants, time has been given; and that if the strict legal course had been pursued, the damages might have been recovered from the principal before his bankruptcy occurred; it must be considered, then, what is the legal meaning of giving time, and what are the legal consequences resulting from it? The true meaning of the expression, as it appears to me, may be thus exemplified:— If a man becomes surety for another for a sum of money to be paid at a stipulated period, and the person to whom the money is due extends the time of payment without the knowledge or consent of the surety, that is, in the legal sense, a giving time; and the consequence would be, that the surety would be absolved from his responsibility, upon the ground that he became surety for one contract, and cannot be justly liable for an altered and not the original contract. This principle I have extracted, not only from the cases cited, but from a careful reference to a large number of authorities which are collected in Mr. Theobald's book.

Assuming, then, that this is the true principle with respect to giving time, it is obvious that it cannot be applied directly to the case before me, for this reason, that no time is specified in the obligation. The obligation entered into by the bail in this case is for the payment of damages, but no precise period is fixed at which [ \* 196 ] the damage is to be \* paid; and it cannot be said in strictness that the settling the amount of the damage out of court is a giving time in the legal acceptation of the term. In order to express my opinion more clearly upon this point, I will state another principle, namely, that mere passive neglect or delay to move onward would not be a giving of time; and if the owner of The Woodpark had simply neglected to follow up the original decree of the court in his favor, the sureties in this case would not have been relieved from the liability upon that ground alone. The rule that mere forbearance does not exonerate the bail, has been laid down and acted upon by Lord Stowell in the case of the Vreede;<sup>1</sup> and the

<sup>1</sup> 1 Dodson, 1.

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same principle is upheld in all the cases which I have examined. The circumstances of this case, however, do not allow me to dispose of it under this rule; it is not a case of mere passive forbearance and neglect; something has been done, and the nature and effects of the acts done I must now consider more minutely. Always bearing in mind the tenor and effect of the obligation, I will first state what the party suing has done in the present instance, and then try the effects of his acts upon the question before me. By the act on petition it appears that Whitehead, the owner of The Woodpark, agreed to settle the amount of the damage out of court, and that such agreement was not communicated to the bail until an application was made to Mr. Marshall, in the letter of the 12th of June, to which I have already adverted: it also appears, that without reference to the register and merchants, the proctor for the party suing alleged in acts of court that the damage amounted to 360*l.*, and the proctor for The Harriett admitted this \*amount, and that the mode [ \*197 ] of payment agreed upon was by bills at certain dates, to be signed by one of the bail as well as by the principal. The bearing of these facts upon the obligation of the bail is the matter for consideration; and I cannot import into the legal view of the case other facts which are to be found in the proceedings. I must decide the question upon principle only; and I must, therefore, dismiss from my consideration whether in this particular instance it was convenient to settle the amount of the damage and costs out of court, or whether Gillies was solvent or insolvent at this or that particular time. I must be governed by general principles, not by accidental circumstances accompanying the case. That I ought so to do is manifest; for otherwise the liability of the bail might depend upon the amount of convenience, and I should have to enter into questions of a subtle or difficult nature as to the time when a man became insolvent. In the view which I have thus taken, I am borne out by the opinion of Lord Rosslyn, in the case of *Rees v. Berrington*, reported in 2 Vesey, jun.,<sup>1</sup> from which I must now make a short quotation. In delivering his judgment in that case, the learned judge made use of the following expressions: "I cannot try the cause by inquiring what mischief the breach of the allegation might have done; for that would go into a vast variety of speculation upon which no sound principle could be built."

As I have already said, I have looked to a great many cases in law and equity respecting the release of sureties. But as the form of the

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<sup>1</sup> Page 541.



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obligation in all the cases differs from the form in which the bail-bond is drawn up in this suit, I have not found any case which is [ \*198 ] \*precisely in point with the present case. I have therefore endeavored, by reflection and consideration, to extract the true principles of law by which the present decision must be governed. This depends upon the following proposition, namely, Has the conduct of Mr. Whitehead in any degree altered or affected the nature of the bails' obligation, so that any possible prejudice might attach upon the sureties? I say might, for I will not stop to inquire whether any prejudice has actually occurred. Should it turn out that the acts which have been done might by possibility have prejudiced the bail, they must be discharged. In thus stating the proposition, I am perhaps stating it even too strongly against the bail; for some of the authorities tend to show that if any alteration whatever is made in the contract, or even in the mode of executing it, the responsibility of the bail is discharged. I have referred to the cases of *Whitcher v. Hall*,<sup>1</sup> and *Eyre v. Bartrop*,<sup>2</sup> and also to the case of *Bowmaker v. Moore*.<sup>3</sup> The last of these cases appears to have the most stringent application to the present case. The case was decided after very grave deliberation, first by Chief Baron Thompson, and secondly by Chief Baron Richards. It differed from the ordinary cases of bail, being a case of a surety in a replevin bond. In ordinary cases, bail is the security for the personal surrender of the principal. In a replevin bond, the bail is a surety for the goods which have been seized. It more nearly approaches, therefore, the case of bail in the

Court of Admiralty. There is also another point in which [ \*199 ] bail in replevin bonds and in the \*admiralty resemble each other more closely, namely, that they cannot interfere with the conduct of the cause at any time. Much as I regret the time I must take up, I now feel it my duty, both for the sake of the important principles involved, and also for the purpose of correcting our future proceedings in these cases, to advert with some particularity to the case of *Bowmaker v. Moore*. According to the report of that case in 3 Price,<sup>4</sup> a motion was made before Chief Baron Thompson, in Michaelmas term, 1816, for an injunction to restrain the defendants from proceeding at law on a common replevin bond, and the injunction was granted by the court. There is some difficulty in understanding the course that was afterwards taken. It appears, however, that an action was prosecuted in the Common Pleas; the case was

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<sup>1</sup> 5 Barn. & Cres. 269.

<sup>2</sup> 3 Maddock, 221.

<sup>3</sup> 3 Price, 214; 7 Ib. 223.

<sup>4</sup> Page 214.

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subsequently brought a second time before the Court of Exchequer, and in a more formal shape, in Easter term, 1819; and Chief Baron Richards, after stating that he should consider the case before he delivered judgment, observed that there were several propositions in the case in the Common Pleas, as reported,<sup>1</sup> to which he could not assent, and particularly that which assumed it to be necessary that the surety should be damnified by the change effected in his situation before he could be considered to be discharged: for that it would be quite sufficient to discharge him that he might possibly be injured by the change. From these expressions of the learned judge, it appears that, in cases of replevin bail, the courts of common law exercise an equitable as well as a legal jurisdiction, although, in mere ordinary cases of principal and surety, they \* do not. Chief [ \* 200 ] Baron Richards, in determining the case, declared it so much a point of importance that he considered it his duty to take time to deliberate before he delivered his judgment. The words of the learned judge, in delivering that judgment, are as follows:—

“ There have already been two decisions on the points of this case, in different courts, and certainly the judgment in the Court of Common Pleas is quite at variance with that of this court. It is very extraordinary that the determination in the Common Pleas was not cited or adverted to when the matter was argued on the original motion for this injunction, which the Court of Exchequer thought proper to grant.” The learned judge then went on to observe,—“ The question now before us is really, in effect, whether, under the circumstances of the case, which were certainly very peculiar, the Court of Common Pleas had determined rightly in deciding that, at the time when the action was brought in that court, the defendant had a right to proceed against the complainant in the suit.” After adverting to the judgment in the Common Pleas, and commenting at considerable length upon the circumstances of the case, Chief Baron Richards further says,—“ It certainly appears that the Court of Common Pleas thought that the arrangement made between the litigating parties was no objection to the action against the plaintiff; but they admitted the law to be, that if, by any arrangement entered into between the obligee and the principal, the surety would be placed in a different and disadvantageous situation, it would have the effect of discharging him by virtue of the rule originally adopted from the courts of equity, but \* now considered to [ \* 201 ] be established law, as it must be held to be in every court in Westminster Hall.

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<sup>1</sup> 2 Marsh. 81, 392; 6 Taunt. 379.

The question was again brought before the Court of Common Pleas by demurrer, on which occasion they seem to have considered that the rule could not operate in this case as in that of bail, because the sureties in a replevin cannot, like bail, at all times interpose in a suit, and because the sureties had not been, in point of fact, prejudiced by the delay." The learned judge then laments, in strong terms, that the Court of Common Pleas was not apprised of what had taken place in the Court of Exchequer, and says, "The real and only question in the case is, whether the surety was, in point of fact, placed in a different situation by what had taken place in the arrangement between the principal and the obligee, and whether by such change of situation he might have been prejudiced, not whether he did, in fact, actually sustain any injury in consequence." Having gone through the other circumstances of the case, the learned judge arrived at the conclusion, that if there was any departure from the original agreement, from that moment the sureties were discharged, and the obligation never could be set up against them in its former shape. What, then, is the effect of this decision, and how does it apply to the present case? The effect of the decision in *Bowmaker v. Moore*, I apprehend to be shortly this: that as the agreement which was subsequently made in that case might by possibility have been prejudicial to the bail from the moment of its commencement, the bail were discharged, and nothing done afterwards could revive their liability.

Does this principle and doctrine apply to the circumstances [ \* 202 ] of the present case? Here is an agreement \* verbally entered into between the parties, as it appears, to settle the damages out of court, and the payment to be made by bills of exchange. It is not necessary to inquire whether such an agreement was, in that stage of the cause, a binding agreement between Mr. Whitehead, the owner of The Woodpark, and Mr. Gillies; it is important, however, to examine the effect of such agreement upon the amount of damages, as affecting the sureties. A suit is commenced by proceedings in this court in a case of damage. A decree is obtained in favor of the party suing, directing a reference to the registrar and merchants. The proctor of that party comes into court on the 6th of July, and alleges in act of court the amount of the damage to be 360*l.*; and this amount is acknowledged and admitted by the proctor for the party proceeded against. I am of opinion, that by this proceeding, both Whitehead and Gillies were estopped from further carrying out the decree of the court as regards the reference to the registrar and merchants. It would be an absurdity for the respective parties in the suit, the one having alleged and the other having admitted the damage to amount to a stated sum, to come to the court and wish to refer to the regis-

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The Harriett. 1 W. Rob.

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trar and merchants a matter which is not in dispute between them. Then, is not such a proceeding a deviation from the original contract by which the sureties were bound? and must not an assessment by private agreement differ from one that is made by the registrar and merchants, and afterwards confirmed by the the court? It is impossible to entertain any doubt that the original contract was that the parties should pay that which was decreed by the court. It is also equally clear, \* that a private agreement between the [ \*203 ] parties in the suit cannot be said to be an adjudication by the court. The answer, therefore, to both of the questions must be in the affirmative. But it is said that the sureties were entitled to a reference to the registrar and merchants, and that it was their duty, for the protection of their own interests, to have insisted upon such reference in the present instance. The averment which has been thus made, as it appears to me, is not well founded in point of law. The sureties are no parties in the original suit, and they are not entitled to interfere in any stage of the proceedings. What would be the consequence if a contrary doctrine was to prevail? Bail is given in these courts in cases of bottomry, salvage, and collision; but the conduct of the suit must rest with the principal; and if third parties, not before the court, were entitled to interfere, the introduction of such parties would be a gross anomaly, and attended with the greatest inconvenience. If the principal is guilty of fraud, or there is any collusion between him and the adverse suitor, the sureties are entitled to apply to the court, alleging such fraud or collusion. Beyond this they have no power of interfering in the proceedings. But supposing that the sureties could have made the demand in question, and that the forms of the court did not prevent such an interference, the next question that would arise in this case would be this: Was not the liability of the sureties upon the present occasion extinguished upon the 6th of July? I think that it was extinguished by the act of Whitehead and Gillies, and that the transaction which took place between them upon that day, coupled by the act in court, discharged the bail in this case \* from their liability. If so, [ \*204 ] all the authorities show that it cannot be revived. If a man is surety for the payment of money upon the 1st of January, and the debtor and creditor arrange between themselves that the payment shall be deferred till the 1st of February, and if afterwards, discovering that such deferring of payment would release the sureties, they should cancel the agreement, the effect would still be, that the liability of sureties once released would not revive by such cancellation of the agreement.

Under the circumstances of the case, therefore, I am of opinion that

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The Heart of Oak. 1 W. Rob.

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the negotiation which took place between Gillies and Whitehead out of court, and all that was done by their respective proctors and acts of court upon the 6th of July, was a complete cancellation of the bails' responsibility, and which nothing subsequently done could revive.

I must, therefore, discharge the bail from their liability in this case.

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THE HEART OF OAK, Crawford.

March 24, 1841.

A bottomry bond executed by the master whilst under arrest at the suit of the bondholder, upheld.<sup>1</sup>

In order to render a bond so executed invalid, it must be shown that the whole of the transaction was compulsorily forced upon the master.

Costs refused to the bondholder.

THIS was a question as to the validity of a bond of bottomry granted upon this ship and her freight, under the following circumstances :

The act on petition for the bondholders in substance sets forth — That The Heart of Oak arrived at Shippegan, in the province of New Brunswick, for the purpose of shipping a cargo of timber for England, in October, 1839, and in the November following was frozen in and detained from such time till the spring of 1840. That the master being without funds or any available credit, applied to [ \* 205 ] \* Messrs. Cunard & Co., merchants, residing at Miramichi, who thereupon made various advances on bottomry for the service of the ship, amounting in the whole to the sum of 459*l.* 1*s.* 9*d.* That on the 29th of April, 1840, the master duly executed the bottomry bond in question in the cause. That the ship arrived in safety at Southampton with her cargo on the 10th of June, 1840, and that since her arrival, the owners and master of the ship have respectively refused payment of the bond, &c.

On behalf of the owners it was stated, in reply — “ That the ship

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<sup>1</sup> [The Prince George, 4 Moore P. C. Rep. 21. As to threat of arrest, see The Hersey, 3 Hagg. 404; The Aurora, 1 Wheat. 96.]

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The Heart of Oak. 1 W. Rob.

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was chartered by R. A., of Boscastle, and, upon the master's arrival at Shippegan, he immediately put himself in communication with Messrs. Fruing & Co., merchants at Shippegan, the factors and correspondents of A., the charterer, to whom he had been directed to apply; that the master was informed by said Fruing & Co. that H. Caix, as the agent to Cunard & Co., would load the cargo; that the ship being detained, by the setting in of the ice, until the 15th May, 1840, divers expenses were incurred on her account, for pilotage, laborage, provisions, and other incidental charges, which were defrayed by Caix, as agent of Cunard & Co., between the 4th November and the 14th December, 1839, amounting, in the whole, to the sum of 147*l.* 11*s.* 10*d.*; that on the 14th of December, 1839, Caix, as the agent of Cunard & Co., drew bills upon the owners of The Heart of Oak for the amount of the said sums, and the bills so drawn were accepted by the master, and sent to England for payment; that additional advances were subsequently made by Cunard & Co., for the service of the ship, amounting to the further sum of 108*l.*, and bills were again drawn by Caix, then agent, and \*accepted by the master, for the amount of the advances so [ \* 206 ] made; that the several bills were refused by the owners in England, and returned dishonored to Cunard & Co., who received notice of their dishonor shortly prior to the 25th of April, 1840; that in the evening of the 25th April, the master of The Heart of Oak had retired to bed in his cabin, when he received a message from Caix, the agent of Cunard & Co., to the effect that a person had arrived at Shippegan from England, and had brought a letter for the said master, and wished to speak to him immediately; that the master thereupon dressed himself, and went on shore to the house of the said H. Caix, and, on arriving there, he was taken into custody by one H. B., who represented himself to be the sheriff of Bathurst, in the county of Gloucester, in New Brunswick; that the said H. B. then informed the master that the bills drawn by him upon his owners had been returned dishonored, and, producing a bottomry bond for his signature, asserted that unless he, the master, signed the same, he would not be released from custody, nor would the ship be allowed to leave Shippegan; that the master at first refused to execute the said bond, and requested permission to go to Bathurst, and obtain legal advice how to act under the circumstances, but such permission was refused, and the master was kept in custody at the house of the said H. Caix for the space of three days, during which time he was repeatedly urged by the said H. B. to sign the bond; that he constantly refused to do so until the evening of the 27th of April, 1840, when, being unable to get any redress, and in

order to obtain his liberation, he agreed to execute, and did, [ \* 207 ] at the house of the said \* H. Caix, execute the bond sued for in the cause ; that the said bond was, in fact, intended to cover the several sums of 147*l.* 11*s.* 10*d.* and 108*l.*, in discharge of which the bills formerly drawn and accepted by the master had been taken by Cunard & Co. ; that until the 25th of April, 1840, no application or suggestion was ever made by the said Cunard & Co., or by any person on their behalf, for a bond of bottomry, nor were the said advances, or any part thereof, made in contemplation of a bond, but were made by Cunard & Co., as the agents of the ship, in the ordinary way of business, and upon the sole security of the bills of exchange ; that the bond sued for was obtained from the master by duress and restraint, and executed by him solely in order to obtain his release from custody, &c.

In a rejoinder given in by the bondholder it was admitted that the advances made by Cunard & Co. between the months of November, 1839, and the 22d of April, 1840, were made by them as agents for the ship, in the ordinary way of business, and upon the sole security of the bills of exchange drawn upon the owners, and accepted by the master. It was also admitted that the master had been arrested, as stated in the owner's reply to the act. The rejoinder then further denying the other allegations of the owners to be true, proceeded to set forth — That it was at the master's own urgent entreaty that Mr. B., the sheriff, suffered him to remain at Shippegan, instead of removing him at once to New Bathurst, and that his detention at the house of H. Caix was that of a prisoner at large only, inasmuch as the said master, during the three days of his attachment, was at full liberty to go, and actually went [ \* 208 ] about and transacted business as before, wherever \* his presence was required ; that the said master, being at such time in absolute need of further advances for the service of the ship, in addition to those already made, in order to enable him to put to sea, it was in the course of the said three days mutually agreed between the said H. Caix and himself that the said H. Caix should make the further requisite advances on the security of the ship and freight, and that in the bond for securing the repayment of such advances should also be included the advances previously made by Cunard & Co., as the sole personal security of the owner ; that, in pursuance of this agreement, the bond now put in suit was freely and voluntarily executed by the master, &c., &c.

The court, before hearing the counsel for the bondholders, called upon the owners' counsel to state the grounds upon which they rested their objections to the validity of the bond.

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The Heart of Oak. 1 W. Rob.

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*Haggard* and *Nicholl*, for the owners. The claim of the alleged bondholder presents itself, in all its features, under a suspicious and unfavorable aspect. In the first place, the bond purports to have been executed by the master, in favor of persons who admit themselves to have made many of the advances in the character of agents, and in the ordinary way of business. Again, the amount of premium demanded is most excessive and exorbitant, being at the rate of twenty per cent. upon the risk of a voyage from New Brunswick to England; a voyage which was to be made in the most favorable season of the year, and which, under the circumstances of this case, did not exceed twenty-three days in its duration.

These facts fully \*justify the owners in submitting the trans- [ \*209 ] action to the investigation of a court of law, and although, *per se*, they might not be sufficient, in the absence of other reasons to invalidate the bond, they are at least of a complexion which does not entitle the claim of the bondholders to any favorable consideration from the court. But there are other and more stringent grounds upon which the validity of the bond is more immediately disputed in the present instance.

It appears by the evidence in the cause, that the greater portion of the advances for which the bond was given as a security was made antecedently to the execution of the bond; and it has been admitted by the bondholders, though somewhat tardily, in their rejoinders, that these advances were made upon the sole security of the bills of exchange, and not under any stipulation for a bond of bottomry. It also further appears by the account which has been brought in that other of the advances were made to cover personal liabilities incurred by the master, which cannot be included in a bottomry transaction. Lastly, what are the circumstances under which the execution of the bond was effected? The master is inveigled from his ship at midnight by a false representation that his presence is required on shore. At the house of the bondholders' agent he is arrested for the amount of the dishonored bills, which had been returned from England. The master is detained in custody for three whole days, and upon the third day of his imprisonment, in order to procure his release, he is induced to sign the bond in issue in the cause. He was, therefore, strictly and legally speaking, under duress of imprisonment, when he executed the instrument \*in question; such an [ \*210 ] execution cannot bind him in law as regards his own personal liability, and *a fortiori* cannot bind the interests of his employers; if bonds thus compulsorily obtained should be upheld by the court, it would afford a dangerous encouragement to fraudulent practices



upon the owners of British vessels, and be productive of great injury to the general interests of British commerce.

*Queen's Advocate and Addams, contra.* The essential foundation of all bottomry transactions is the unprovided necessity of the master, and where this necessity is shown to exist at the time the bond is given, the claim of the bondholders has always received a favorable consideration from the court. In the present case, this point is clearly established on the part of the bondholders, and is not controverted on the other side. They do not attempt to deny that subsequently to the 22d of April, 1841, the distress of the master was most urgent; neither have they ventured even to suggest that without a bond of bottomry, the master was possessed of any available means of raising the requisite funds to enable him to put to sea. It has been urged, however, that the bond in question includes former advances which were made upon the sole security of the bills of exchange, also that some of the items in the master's account are not legal objects of a bond of bottomry. On the part of the bondholders, we concede that the repayment of the money advanced upon the bills of exchange cannot be enforced against the owners of this vessel under the present bond. With respect to the items which have

been objected to, we submit that their validity must be de-  
[ \*211 ] termined by a reference to the \*registrar and merchants.

The question is, will the insertion of these advances and items in the bond invalidate the whole transaction? Undoubtedly not. This point has been decided by Lord Stowell, in the case of *The Augusta*,<sup>1</sup> a case strongly in point with the present case. The *dictum* of Lord Stowell, in the case of *The Augusta*, is to this effect: "It is not necessary that a bond should be either good or bad *in toto*; in the equitable proceedings of this court it may be good in part, and bad in part." Again, it has been urged that the bond was executed by the master under duress, and that it is, therefore, invalid. The question, therefore, arises, what is the legal meaning of the term duress? The term is defined by Mr. Justice Blackstone, in his *Commentaries*, to mean a compulsion by illegal restraint of liberty. How can this be applied to the circumstances of this case? The master, it is true, was in custody at the time he executed the bond, but he was in custody of the legal authority of New Brunswick, and for a legal object, namely, the non-payment of the money advanced upon the bills

<sup>1</sup> [1 Dod. 283.]

of exchange, for which the master, as well as his owner, were equally responsible; imprisonment under such circumstances is widely different from the duress of imprisonment, and it is so laid down by Mr. Justice Blackstone, in the following words: "If a man be lawfully imprisoned, and either to procure his discharge, or on any other account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it."<sup>1</sup> The present case falls clearly within the principle there laid down. The master was under lawful imprisonment, and the foundation of the transaction was fair and legal, namely, the \*indispensable necessity for further advances to enable the vessel to put to sea. Lastly, with respect to the objection to the amount of the premium. We submit that the reasonableness of the rate of interest that is charged in these cases by the lender, must depend upon a variety of circumstances existing at the time and place where the advances are made, upon which the court cannot safely adjudicate. The court has at all times been reluctant to interfere in such matters, and it would be highly detrimental to the interest of commerce, if the court in the absence of any specific fraud in the transaction should lend its authority to disturb the terms of the original agreement between the contracting parties in cases of this description. Upon this principle the court had acted in the case of *The Cognac*,<sup>2</sup> by directing the registrar's report to be reformed, and allowing the original premium, which had been reduced from twenty to twelve and a half per cent., in that case. In the present instance, no fraud or collusion is proved to have existed between the lender and the master when the money was advanced, and the rate of interest is justified by the total inability of the master to procure the necessary advances on any other terms.

## JUDGMENT.

DR. LUSHINGTON. The court having fully adverted to the facts of the case, proceeded to observe to the following effect: "Several exceptions have been taken against this bond, and have been discussed in the argument of the counsel for the owners. The main objection, however, against its validity, it appears to me, is confined to the circumstance, that the master of \*this vessel, at the [\* 213] time the bond was executed, was in custody at the suit of the parties by whom the advances were made. As a general proposition of law, it is undoubtedly true that a deed extorted by actual duress is invalid, and this principle of law would clearly extend to

<sup>1</sup> Blackstone's Commentaries, vol. i. p. 139.<sup>2</sup> 2 Haggard, 377.

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The Heart of Oak. 1 W. Rob.

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vitate a bond of bottomry compulsorily obtained by duress from the master, even although the advances were made upon the promise of a future bond, and the bond itself was taken as a fulfilment of that promise. In applying this principle to the present case, then the question arises how far the master of The Heart of Oak executed the bond in question under absolute duress? Now it is an admitted fact in the cause, that he was under the attachment of the sheriff of New Brunswick at the time he executed the bond, but does it necessarily follow that he was therefore under duress? I apprehend not; it is one thing to assert that a bond was executed in imprisonment or under the attachment of a sheriff, and another thing to say that it was executed under duress. *Non constat*, that an instrument executed under imprisonment is necessarily invalid; and before the court can arrive at any such conclusion in the present case, it must be satisfied that the whole of the transaction was compulsorily forced upon the master, otherwise the mere fact of his imprisonment alone will not avail to render the instrument invalid. What, then, are the circumstances disclosed in the evidence upon this part of the case? The master of this vessel, it appears, actually applies to the agent of the bondholders for further advances, and receives from him the sum of 120*l.* for the service of his ship, and this at the very moment when he is called upon to execute the bond in question. The money [ \* 214 ] \* so advanced is included in the bond; and can I hold that, in accepting this money, the master was acting under compulsion, and against his will? In so holding, I should indeed be straining a construction of the master's conduct in favor of the owners, beyond the limits which common sense and the justice of the case will allow. The true state of the case I conceive to have been this: The master was in great difficulties; he had no money to furnish the requisite supplies for the future service of his ship, and had no means of discharging the former obligations which he had incurred upon her account. In this emergency he applies to the agent of the bondholders for additional advances, and upon the receipt of these he consents to execute the present bond. The question then recurs, whether, under such a state of circumstances, the execution of the bond, although the master was in custody at the time, falls within the principle of a deed signed under duress? I am clearly of opinion that it does not. The course therefore which I must adopt is obvious. By the practice of the court in proceedings of this kind, bonds of bottomry are divisible, and the court may pronounce a bond to be good in part and bad in part. I must therefore pronounce in favor of this bond so far as relates to the advances which were made subsequently to the 22d of April. At the same time I must express

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The Heart of Oak. 1 W. Rob.

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the dissatisfaction of the court, that the master should have been imprisoned at all, and the execution of the bond should have been pressed upon him whilst he was under actual confinement. In such circumstances the owners of this vessel were fully justified in submitting the transaction to the investigation of \* the [\*215] court; and I shall decline to give the bondholders their costs in the present instance.

With respect to the items which have been excepted to in the master's account, the court cannot take upon itself to decide upon their admissibility in this stage of the proceedings. By the affidavit of the master at the foot of the account, which to a certain extent recognizes the bond at a period when he was no longer in imprisonment, it clearly appears that a great portion of the advances were applied to purposes fairly within a bottomry transaction. With respect to the excepted items, I have no information before me at present to determine whether they are admissible or not. I shall therefore refer them to the consideration of the registrar and merchants.

I shall also adopt the same course with respect to the premium which has been charged in this case. It has been said that the court cannot safely adjudicate upon this part of the question; and the case of *The Cognac*<sup>1</sup> has been cited to support the assertion, that this court has always been reluctant to interfere with the terms of the original agreement respecting the rate of interest.

Now in the case of *The Cognac*, a reference was expressly directed to the registrar and merchants upon this very point; and the fact that such a reference was made, clearly establishes that the court possesses jurisdiction on the subject-matter. Possessing this jurisdiction, it would, I conceive, be inconsistent with equity (and this court sits as a court of law and equity) that the court should decline to interpose its authority to reduce the premium when the rate of interest is excessive. I therefore pronounce for the bond to the extent I \* have already stated; and decree a reference to the registrar and merchants as to the excepted items, and also the amount of the premium.

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<sup>1</sup> 2 Hagg. 377.

THE WESTMORLAND, Brigstock.<sup>1</sup>

May 4, 1841.

In cases of alleged desertion the application of the ancient maritime law is not excluded by the statute 5 and 6 W. 4, c. 19.

Construction of the second section of the act.

The words "nature of the voyage" must have such a rational construction as to answer the leading purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he engages.

The mere going on shore without leave to seek advice as to the effect of the articles, not a desertion under the general law.

Imprisonment of the mariners for so going on shore an important ingredient in the case, as taking away all *locus penitentie* and all opportunity of returning to their duty on board the ship. Wages pronounced for.

THIS was a suit for wages promoted by three of the mariners who served on board this vessel, under the circumstances noticed in the judgment of the court.

On behalf of the mariners, *Addams* and *Robinson* contended—That by the fair construction of the mariners' contract, the seamen were entitled to their discharge upon the arrival of the vessel in a port of Great Britain. That the second section of the statute 5 and 6 of Will. 4, under which the ship's articles purported to have been drawn up, expressly provided, not only that a written agreement should be mutually signed by the master and seamen before the commencement of a voyage, but that the nature of the intended voyage should be explained and set forth in such agreement; and in the schedule annexed to the third section of the act it was particularly directed in the words following, namely, "Here the intended voyage is to be described as nearly as can be done, and the places at which it is intended the vessel shall touch, &c." If, therefore, it had been the original intention of the owners that the vessel should return to England for orders in the first instance, and then proceed to a port of the continent to discharge her cargo, such intention [\*217] should have been specified in the mariners' contract; that such specification had been held requisite by Lord Stowell in the case of *The George Home*,<sup>2</sup> and the authority of that case was strongly applicable upon the present occasion. That even assuming the owners' interpretation of the articles to be correct, and

<sup>1</sup> [S. C. 1 Notes of Cases, 11.]

<sup>2</sup> [1 Hagg. Ad. Rep. 370.]

that the seamen were bound to proceed with the vessel to Holland, the mere act of quitting the ship as they had done, and going on shore at Cowes for the purpose of procuring advice, was not such an abandonment of the vessel as would have amounted to desertion even under the ancient law, still less would that character attach to it under the particular statute in question. That the passing of the statute 5 and 6 Will. 4, excluded all other desertion than that which was specially defined by the statute; and under the ninth section, to constitute desertion under the present law, it must be shown not only that the mariners absented themselves from the ship without permission of the master, but that they did so "under circumstances plainly denoting that it was their intention not to return thereto." That by the same section, in order to entail upon the seamen so deserting the entire forfeiture of their wages, and their effects on board, it was still further requisite "that the circumstances attending such desertion should be entered in the log-book at the time, and certified by the signature of the master and mate, or some other credible witness." That under the circumstances of the case, it was clear the alleged desertion in the present instance was not brought within the provisions of the statute, inasmuch that no entry in the log-book was pleaded, and all *locus penitentiae*, and all opportunity of returning to their duty on board the vessel, had been taken away from the mariners by \* the illegal imprisonment to which they had [ \* 218 ] been subjected by the magistrates at Cowes, at the instigation of Captain Brigstock, the master. Lastly, that the magistrates, in committing the seamen to prison, under the sixth section of the act, had exceeded their authority, and were liable to an action at law for so doing; and the punishment which the seamen had thus wrongfully undergone had a material bearing upon the question at issue, inasmuch that it would be contrary to all justice, that the seamen, having once been punished at the instigation of the master, the agent for the owners at Cowes, should for the same offence be now punished a second time in this court, at the prayer of the owners themselves, by the forfeiture of their wages as prayed for.

For the owners, *Haggard and Nicholl, contra*. That the legality of the magistrates' proceedings at Cowes formed no part of the issue in the cause; and however wrongful the imprisonment of the mariners might have been, under the sixth section of the act, the court had no jurisdiction to afford them any redress. The question at issue was confined to this, whether by such imprisonment of the seamen the owners were deprived of the pecuniary forfeiture to which they were entitled in this court. That under the general mari-

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The Westmorland. 1 W. Rob.

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time law, the abandonment of a vessel before the cargo was discharged, even in the port of discharge, was a desertion, entailing a forfeiture of wages; and such law had not been abrogated by the passing of the statute 5 & 6 of Will. IV. That the case of *The George Home* was widely distinguishable from the present case, for this reason, [ \* 219 ] that the ship's articles in that case \* were drawn up under the provision of the statute 22 Geo. II., which required the voyage to be set forth in the mariner's contract, whereas in the recent statute 5 & 6 Will. IV., a greater laxity was allowed, and it was sufficient that "the nature of the intended voyage" should be explained and specified. There was moreover this most important distinction between this case and *The George Home*, that the duration of the voyage, in the articles which had been signed by the mariners in this case, was specifically limited to the term of three years.

#### JUDGMENT.

DR. LUSHINGTON. The question which I have now to decide is, whether the mariners who have commenced the present suit are entitled to the wages which they have claimed. A summary petition and an allegation have been given in, and witnesses have been examined on both sides; and without at present noticing any minor contradictions which may be found in the evidence, it may be stated that the parties are agreed as to the leading facts of the case, although from the premises they draw very different conclusions. The vessel, it appears, left England in the year 1839, bound on a voyage, or course of voyages, described in the ship's articles in the following terms:—"From the port of London to Swan River, Western Australia, from thence to any port or place in the Indian or China Seas, and during her stay and trade there until her return to a port of discharge in Great Britain or continent of Europe, (in either case the voyage to end in Great Britain,) and the cargo delivered if re- [ \* 220 ] quired; and term of time not to exceed three years." \* She accordingly proceeded to the Swan River, and discharged her cargo there; and in the beginning of the year 1840, the mariners now suing for their wages were hired, and signed, by way of agreement, as they allege, the original ship's articles. After visiting Batavia, the vessel proceeded to the Isle of Lombock; and in the month of June sailed thence with a cargo, homeward bound. On the 28th of October following, she arrived at Cowes, and on the 30th of that month, the master, after communication with his owners, brought a North Sea pilot on board for the purpose of conducting the ship to Holland. Upon seeing this, the mariners apprehending that by the tenor of the articles they were not bound to proceed to

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Holland, went on shore early on the next morning to seek advice, and whilst so occupied they were arrested by the master and carried before the magistrates sitting at Newport, and, refusing to return on board the ship, they were by the authority of such magistrates committed to the house of correction, there to be kept to hard labor for thirty days. Such is the brief outline of the case before the court; and the questions that have been raised upon it, and which are at issue between the parties are these: The first question is, whether the mariners were bound by the articles to proceed to Holland? If they were not bound, then of course there could have been no forfeiture, and the seamen are entitled to their wages. But assuming that the owners are right in their construction of the ship's articles, and that the mariners were bound to proceed with the vessel to the continent, the court will then have to consider and determine whether all the facts and circumstances of this case amount to a desertion on their part. I \*shall now proceed to consider the latter ques- [ \*221 ] tion in the first place. Upon the part of the owners it has been argued that the facts constituted desertion by the common maritime law, which has not been altered or repealed by the statute 5 & 6 Will. IV., c. 19. I do not understand it to have been averred that there has been a desertion under the statute; and I am of opinion that had such a proposition been attempted, it could not have been contended for with effect. Now, on looking to the wording of the statute, I incline to the opinion that the act 5 & 6 Will. IV., c. 19, does not exclude the ancient maritime law; and that it is my duty to examine the facts of the present case, with a view to ascertain whether they constitute a desertion according to the ancient principles which constituted the law of this court before the statute in question was enacted.

In the books of common law authority, I do not find any definition of what desertion consists; and it would perhaps be difficult to state any definition which would comprise that offence, under the variety of circumstances that may occur. The statute has attempted a definition so far as relates to the particular circumstances contemplated by it, and it states that absence from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission from the master thereof, or for any period, however short, under circumstances plainly showing that it was his intention not to return thereto, shall be deemed an absolute desertion. I might here notice, that the counsel for the mariners have urged upon the court that these words negatived any other desertion, and that they comprehended all the desertion the law intended. Now, \*although I am ready to admit [ \*222 ]



that this argument is not without weight, yet, upon the best view which I can take of the question, I am of opinion that the statute, in order to work such an effect, must have gone further, and must necessarily have excluded the ancient law. The circumstances to which I have already adverted constitute desertion under the 9th clause; and the latter part of the sentence with which that section concludes, seems to embrace almost every possible case. I do not think it requisite to enter into any minute disquisition whether other circumstances constituting desertion might not occur in the various duties which a mariner's engagement entails upon him. I shall not, therefore, attempt any definition of desertion generally, but content myself with the observation that, to constitute desertion in such a case as this, there must be a complete abandonment of duty, without justification on the part of the mariners; and such abandonment must, moreover, be by quitting the ship. I must now proceed, step by step, to consider whether there has been such an abandonment of duty on the part of the mariners in the present instance. On behalf of the owners, it has been alleged that when the crew were informed of the intention to take the ship to Holland, they declined to perform their duty in pumping, and also in other matters requiring their exertions as sailors.

Assuming the fact to be as stated, such conduct would be insubordination; it would not be desertion. The distinction and difference between the two offences must be borne in mind. The utmost that could be said of it, is, that it may be a fact explanatory of their subsequent conduct; and assuredly, whether the sailors were [ \* 223 ] right or wrong as to other matters, it was misconduct on their part. The next morning the crew, it appears, having previously sent to consult Mr. Day, of Cowes, and having received a letter from him, went on shore without leave to advise with that gentleman as to the effect of the articles. With respect to the step so taken by the crew, I am of opinion that it cannot be deemed a desertion; for whatever may be the true legal effect of the articles, I entertain a very decided opinion that there was quite a sufficient degree of obscurity to justify the seamen in endeavoring to obtain information as to the extent of the obligations into which they had entered on signing the ship's articles. Releasing them, therefore, from all responsibility for this incipient step, the next point in the proceedings is the arrest of the mariners at the instance of Captain Brigstock, the master.

The men went on shore between eight and nine o'clock in the morning. Captain Brigstock applied for a warrant as soon as he heard they had so quitted the ship, and the mariners were arrested as

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the constable could meet with them, either at Mr. Day's house or in the immediate vicinity, and immediately conveyed before the magistrates who were then sitting in petty sessions at Newport. Now, up to this time there was, in my opinion, no completed desertion. Time might have affixed that character to the conduct of the seamen; but even according to the definition of the act of parliament, there was not enough plainly to indicate that it was not the intention of the seamen to return on board the ship. Common justice would require a reasonable time to elapse for the men to consider their situation under such peculiar circumstances before the character of \*desertion could be conclusively fixed upon them. If, there- [ \* 224 ] fore, there is any desertion in this case, that legal consequence must be ascribed to the circumstances which took place before the magistrates. What, then, occurs when the mariners were so taken before them? The magistrates, it appears, were of opinion that the ship's articles bound the crew to proceed with the vessel to Holland, and so declared their opinion to them, at the same time informing them, that by refusing to return to the ship they rendered themselves liable to imprisonment and the forfeiture of their wages. The men persisted in following the advice which they had received from Mr. Day; and upon this the magistrates committed them to prison and hard labor for thirty days. It has been said in the argument, that the court cannot inquire into the legality of the order so made by the magistrates, or afford to the mariners any relief, if it be illegal; and it is certainly true that the Court of Admiralty cannot give damages for false imprisonment; but so far, at least, as that imprisonment bears upon the question of desertion, I think that I both can and ought to inquire into it. Looking, then, to the order of the magistrates, I am of opinion that they were in error in proceeding against the seamen under the 6th section of the act 5 & 6 Will. IV., an error for which the obscurity of the statute furnishes much apology. And what has been the result of such error on their part? It has been this: that the mariners were threatened with illegal imprisonment, were in prison when they ought to have been at large, and that they underwent a confinement which the law did not sanction. Now it appears to me that the threat of illegal imprisonment, even to \*enforce a lawful obligation, is not altogether [ \* 225 ] an unimportant ingredient in the consideration of the present case. The circumstance, however, which weighs most deeply in my mind, is this, that, by such imprisonment, that which existed at the moment principally, though not entirely, in declaration, and which was not a consummated desertion, was rendered absolute and complete; that all *locus penitentiae* was taken away by bodily duress.

Had neither the threat been used, nor the imprisonment inflicted, it is not impossible that the seamen (and they are unquestionably entitled to the benefit of the possibility) might have returned to their duty on board the ship; and when I consider that this error was occasioned by the act of the master, the agent of the owners, I think the seamen are entitled to the advantage arising from it. Upon the whole, therefore, I am of opinion that, even assuming the owners' construction of the ship's articles to be correct, there has not been a desertion, either under the statute or by the ordinary maritime law, if such law is not affected by the statute.

As I have hitherto proceeded upon the assumption that the articles legally bound the seamen to proceed with the vessel on the voyage to Holland, and have arrived at the conclusion that even in that view of the case there has been no desertion on the part of the mariners in the present instance, I might, perhaps, have been justified in abstaining altogether from further observation upon the case, but I think I ought not to shrink from delivering my opinion as to the construction of the articles in question, although I feel my task in so doing to

be attended with some difficulty. In the first place, then, [ \* 226 ] let me consider whether there is any authority \* which has been cited in any degree applicable to the circumstances of the present case; and secondly, how far the circumstances of the two cases may not correspond, or how far the law has been altered, so as to render any previous decision no safe guide in the present exigency. The case that has been referred to in the argument is the case of *The George Home*,<sup>1</sup> decided by Lord Stowell, with respect to which it is not necessary for me to consider the whole of the articles. The decision in that case turned upon the description of the port of delivery, which was in these words, "until her final arrival at any port or ports in Europe." The articles in the present case run thus, "until her return to a port in Great Britain or continent of Europe." Now, if the law remained the same, and there was nothing else more definitive or explanatory in the articles, I am at a loss to understand how any distinction could be taken between the two cases. The whole reasoning of Lord Stowell applies with equal stringency to the one case and the other. To use his own words, "the articles would apply with equal truth to Corfu and Archangel;" and most applicable is his observation that the contract ought to have stated that the ship was to have called at Cowes for orders for the delivery of the cargo in England, Holland, or in the ports of the North Sea. Most

<sup>1</sup> [ 1 Hagg. Ad. R. 370. ]

cordially do I concur both in the reasons assigned by Lord Stowell and in the conclusions to which he arrived; and assuredly, unless I discover a clear distinction arising from difference of circumstances, I should not have the inclination, I might almost say the presumption, to deviate from that very high authority. There is no part of the judicial example set by that great judge to which I am more anxious to adhere than that wise discretion with [ \*227 ] which he administered justice in equity in all cases where the claims of mariners came under his consideration. It has been argued in behalf of the owners, that the articles in the present case are essentially distinguished from those to which the seamen subscribed in the case of *The George Home*, and for this reason, that the voyage is limited to three years; but I cannot view that limitation in the light which it has been represented. That limitation appears to me in no degree to apply to the question now at issue, which is not how long the sailors might possibly be detained in the service of the ship, but in what part of the world such service was to be performed.

Finally, I have to consider the effect of the statute which has passed since the decision in the case of *The George Home*. The difference between the two statutes is this, that by the former statute, that of Geo. II., it was necessary to state the voyage in the articles; by the later act, the words "nature of the voyage" have been substituted in lieu of the former expressions. I must presume that this was advisedly done, and I must give a rational construction upon the import of such alteration. I must, therefore, consider these words as relaxing the strictness of the obligation before imposed. But to what extent? To such an extent as may accord with the reasonable convenience of trade, and at the same time afford to the mariner as much certainty as to the import of his contract as is consistent with that convenience. On the one hand I am bound to consult the interest of the mercantile world: on the other hand to give protection to the mariner. Now, are the articles in the present case as explicit as the convenience of trade will allow? I am [ \*228 ] of opinion that they are not; I think that nothing would have been easier than to have specified in clear and intelligible language all that the owners could have desired to have done. Lord Stowell, in delivering his judgment in the case of *The George Home*, has himself explained how this object might have been effected; and had any ulterior intentions been entertained, how easy would it have been to have expressed them in the ship's articles in the present case, by simply stating, "to a port of discharge in Great Britain, or in the north of Europe." In interpreting the act of parliament, the

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words "nature of the voyage" must have such a rational construction as to answer the main and leading purpose for which they were framed, namely, to give the mariner a fair intimation of the nature of the service in which he was about to engage himself when he signed the ship's articles. Looking at the tenor of the articles in the present case, I am of opinion that the terms which are used give him no intimation whether he is to winter in the frozen regions of the north, or perform an easy service in the luxurious climate of Naples or Trieste. I am yet to learn that such comprehensive ambiguity is necessary for the purposes of trade; and if not necessary, I cannot believe that a just construction of this statute will impose any such grievance upon the seaman. I am not disposed to narrow its interpretation in cases where the exigence or convenience of commerce call for an extended latitude of construction; but I am inclined to say that this statute does not warrant an arbitrary extension of terms not required for the interest of the owner, yet so vague and [ \* 229 ] indefinite as to deprive the mariner \* of all the benefit intended to be conferred upon him, when the legislature ordained that some information should be conveyed to him of the extent of the obligation into which he was about to enter. For these reasons I am of opinion that the statute does not confer upon these articles a validity which they certainly would not have possessed if framed before the statute passed.

I must therefore pronounce sentence in favor of the claim set up by the mariners in this case, and, as a matter of course, with costs against the owners; and I cannot but lament that, considering that these persons have suffered a wrongful imprisonment, though innocently, on the part of the owners, it should have been deemed necessary to carry on the controversy in this court.

Wages pronounced for with costs.

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THE WESTMINSTER.

May 4, 1841.

Salvage awarded upon a quantity of tea saved from a stranded vessel.

Suggestion that the service was a mere transshipment of cargo overruled.

Where cargo at all requires assistance to remove it into a place of safety, the service assumes the character of a salvage service.

Vessel subsequently brought into port under a separate agreement with the salvors.

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Attempt to exclude from the terms of the agreement some tin on board at the time, serving as ballast, not sustained.

Agreements for the salvage of the ship, irrespective of the cargo on board at the time, not allowed by the court.

Where such agreements are proved, court will refuse to pronounce any salvage due.

THIS was a claim for a salvage remuneration, promoted by the Margate Steam-Packet Company against the consignees of a cargo of tea, and the owners of a quantity of tin, which it was alleged had been saved by three steam-vessels belonging to the company, when The Westminster was driven by stress of weather on the rocks in Palm Bay, to the eastward of Margate, upon the 22d of November last.

On behalf the M. S. Company it was set forth in plea : That the master of The Westminster, when his vessel had grounded upon the rocks, engaged the services of The Royal George, The Royal William, and The Adelaide, to unlade the cargo and \* con- [ \* 230 ] vey it to London ; a stipulation being made at the time, that in consequence of the value of the steamers, the company to which they belonged should be remunerated "according to the services rendered and the risk encountered ; that a portion of the tea on board The Westminster, amounting in value to the sum of 35,977l., was transhipped on board the steamers, and conveyed to the East India Docks ; and upon the 7th of December, The Westminster, having the tin on board, and which had never been removed, was towed up to London by The Royal George, under a separate agreement made with the master of that vessel. It was also represented that the value of the steamers amounted to 30,400l. ; that one of the steamers had been employed in the service for the space of six days, another for four days, and the third for three days, and that the crews on board the several vessels consisted of fifty-eight persons.

For the consignees of the tea, *Phillimore and Addams*.

For the owners of the tin, the *Queen's Advocate*.

For the salvors, *Jenner and Harding*.

#### JUDGMENT.

DR. LUSHINGTON. This vessel was bound to the port of London from Singapore, with a very valuable cargo on board, consisting of tea, and also of some tin used principally as ballast, when she unfortunately met with bad weather in coming up the channel, and was driven upon the rocks in Palm Bay, about a mile or a mile and a

half from Margate, in the morning of the 22d of November last.

At four o'clock in the afternoon of the same day, the master [ \* 231 ] \* went on shore, and proceeded to Margate with the pilot, to make arrangements for the protection of the ship from plunder during the night, the state of the weather being such as to render it unsafe for any one to remain on board. In pursuance of these arrangements, the vessel was placed under the custody of the preventive coast-guard during the night, and on the following morning the master and crew returned on board, and the services of the steam-vessels were engaged. It has been contended, that all which was done by the steam-vessels amounts in point of fact to a mere question of transshipment of the cargo from one vessel to another, in the fulfilment of the agreement, which the owners of The Westminster undertook to make good when they engaged to transport the cargo to London. Looking, however, to the evidence before me, I am of opinion that the circumstances of the case do not altogether support that argument. I apprehend that where a cargo becomes in any degree of danger, the duty of transshipment, however strongly it may be imposed upon the owners of the carrying ship, cannot at all affect the interests of others who may be concerned in the preservation of the cargo, and if any dispute should arise between the owners of the ship and the owners of the cargo, the cognizance of the question must belong to another tribunal, without reference to the interests of those engaged in effecting the service of the carriage of the cargo. In a mere question of transshipment, this court, I conceive, would have no jurisdiction on the subject-matter. If, therefore, this was a case of transshipment only, the consignees would have clearly have mistaken their own way, in not appearing under protest to [ \* 232 ] the jurisdiction of the court in the \* present instance ; but looking to the facts of the case, I am of opinion, that whatever may be the nature of the service which has been rendered in other respects, it is to be considered as a salvage service, and for this reason, that the vessel was grounded on the rocks, and the cargo itself was in danger. The degree of the danger is immaterial, in considering the nature of the service, for if the cargo at all required assistance to remove it into a place of safety, the service then assumes the character of a salvage service, and it becomes the duty of this court to adjudicate upon it as such, and to allot the remuneration upon a different consideration from that which would apply to a mere service of transshipment. Now I cannot entertain a doubt that the cargo on board this vessel was in a certain degree of danger, and for this plain and obvious reason, namely, that it is an admitted fact in the case, that the cargo has undergone a considerable degree of

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damage, and a portion of it has been affected by the sea-water and chalk, and become much deteriorated in consequence. It was therefore imperative upon the master of The Westminster, circumstanced as that vessel was, to remove without loss of time into a place of security, a cargo of so valuable and perishable a kind, and to forward it to its port of destination. Having expressed my opinion on this point, I come now to consider what is the amount of remuneration, which, under all the circumstances of the case, I think the owners of the steam-vessels, and the persons on board them, are entitled to receive; and, for this purpose, I will in the first place endeavor to ascertain what I apprehend will be an equitable estimate,—for it is impossible to approach any other,—of the value of the property, \*respecting which an adjudication is to be made. The pro- [\* 233 ] perty in question is the tea saved by the steamers, and also the freight due upon the tea so salvaged, as they are both liable to salvage. According to the affidavits, the total net proceeds of the tea are stated to be 35,977*l.* or, in round numbers, 36,000*l.*; but from this has been deducted the charge of freight, which ought not to be deducted for the purposes of my judgment. The charge of freight amounts to 4,460*l.*; therefore the total value exceeds 40,000*l.* Now the quantity of teas salvaged by the steamers is stated to be 482 tons, and by the sailing vessels 398 tons. It would be easy by the rules of arithmetic to state the precise proportion of the value with respect to quantity, but it is impossible to do so in value, because it is impossible to ascertain what proportion of the damaged tea was shipped on board the steam-vessels, or what proportion on board the sailing vessels. As far as the evidence goes, it would tend to show that the largest proportion (comparatively the largest) of the teas transshipped on board the sailing vessels consisted of damaged or deteriorated teas. Now taking the real value of the whole at 40,000*l.*, I think if I were to estimate the value of the teas salvaged by the steam-vessels, in regard to quantity and quality, at 24,000*l.*, including the freight, I should not do injustice to any of the parties, and it must be recollected, that, in proportion to the value, the freight must pay for any sum which I may adjudicate to the salvors.

Having thus endeavored to settle the amount of the value, the next consideration is, who were the persons who performed the service? It is stated that there were three steamers, the value of which \*exceeds 30,000*l.*; that they had fifty-eight men on board; [\* 234 ] that one vessel was employed for six days, another for four days, and the other for three days. With respect to the service itself, it appears not to have been attended with much risk or danger. I think the cargo was in danger, not merely from the condition of the



ship, (described by the master in his protest to be such that it was impossible to get her off, and that the water flowed into her whenever the tide rose,) but for another reason, namely, that although the weather was moderate during the whole time the service was rendered, yet it is clear that, by one of those contingencies which so frequently happen at that season of the year, the weather might have changed, and then the ship and cargo would have been in very considerable danger; and all these contingencies must be taken into consideration when my judgment is to be formed in a question of this kind.

Now, looking at the whole case, not altogether forgetting that one of these vessels was engaged to carry passengers from Margate to London, and though, perhaps, at that season of the year, such engagement must be presumed to have been of no great value to the owners, yet it is not altogether to be left out of the question, since the disappointment of the passengers might work subsequent inconvenience to the owners,—taking all these circumstances into consideration, I think I shall not allot a very extravagant sum to be paid by both the tea and the freight, if I allot the sum of 1,500*l*.

With respect to the tin, that appears to me to stand on a totally distinct and different foundation. I am at a loss to conceive [ \* 235 ] how there could be any \* agreement for bringing up the ship without the tin on board her, and which was performing the office of ballast. I apprehend, that agreement must of necessity include the bringing up the tin. If it did not, I know of nothing more dangerous than setting a precedent, when a cargo is on board a ship, of making an agreement with a party for salvage of the ship and not the cargo; that would open a door to every description of fraud. Only contemplate the consequences, supposing the whole cargo had been on board, and an agreement, under circumstances which would give to the service the character of a salvage service, had been made by the master, who should say, "You shall bring up the ship to London for 50*l*., and do the best you can against the owners of the cargo;" why, it would be an encouragement to fraudulent bargains by owners and masters of vessels, to the detriment of owners of the cargo, and of course salvors would make a bargain much more advantageous to the owners of the ship with the master when they are sure of obtaining his assistance to get a larger salvage from the owners of the cargo. If there was any such agreement in this case, (which I am not at all disposed to conjecture; on the contrary, I believe, that the agreement included the bringing up of the tin,) but if there were, I should decidedly set my face against it; and I now state, that should I ever find this to be the case, or any thing at all approaching to it, I shall at

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The Eagle. 1 W. Rob.

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once refuse to pronounce any salvage due at all under such circumstances.

I am of opinion that, with respect to the tin, it is perfectly clear that no salvage ought to be claimed; therefore I dismiss that subject entirely from consideration.

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\* THE EAGLE, Litty.<sup>1</sup>

[ \* 236 ]

June 8, 1841.

A wrongful dispossession of original seizors confers no title to the second seizors in the bounties awarded by act of parliament on the tonnage of a condemned slave ship.

Construction of the act 5 Geo. 4, c. 113, s. 71, and of the treaty with Spain, 28th June, 1835. Court of Admiralty not excluded by a sentence of the Mixed Commission Court from considering the question to whom the bounties or the proceeds arising from the condemnation belong.

960*l.* paid by the lords of the treasury, as bounties to the agent of the second seizor, directed to be brought in and paid over to the agent of the original seizors.

Costs against the second seizor not given.

In this case, *The Eagle*, equipped for the slave trade, and navigated under American colors, and with an American pass and master on board, whilst at anchor in Lagos Roads, on the 31st December, 1838, was boarded from her Majesty's ship *Buzzard*, (Lieutenant Fitzgerald, commander,) but was not detained. In January, 1839, the commander of her Majesty's ship *Lily*, having proceeded in that vessel to Lagos Bay, and finding *The Eagle* still lying at anchor, took possession of her, and sent her under the charge of Mr. Boys, an officer on board *The Lily*, to Sierra Leone for adjudication. The Court of Mixed Commission at Sierra Leone refused to adjudicate, upon the ground that the vessel was ostensibly American property, and that the right of searching American vessels had not been conceded to British cruisers by the American government. After considerable detention at Sierra Leone, Mr. Boys proceeded with *The Eagle* for the purpose of obtaining further instructions, either from the commander of *The Lily*, if he should be able to fall in with him, or from any other officer he might meet in command of a cruiser on that station. On the 12th March, 1839, he arrived in Clarence Cove, and

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<sup>1</sup> [S. C. 1 Notes of Cases, 64.]

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there found her Majesty's ship Buzzard at anchor, under the command of Lieutenant Fitzgerald, to whom he communicated the proceedings that had already taken place with respect to The Eagle. Lieutenant Fitzgerald then boarded The Eagle, and having threatened the master to send him with the vessel to New York to be dealt with by the law of the United States, the master confessed the [ \* 237 ] property \* in the vessel to belong to Spanish owners ; and that he was only the ostensible master for colorable purposes, and that he surrendered to The Buzzard. Lieutenant Fitzgerald thereupon sent an officer and prize crew from The Buzzard on board The Eagle, receiving Mr. Boys and the men of The Lily, who had been in charge of her, on board The Buzzard as supernumeraries. Lieutenant Fitzgerald subsequently proceeded in The Buzzard with The Eagle, and another vessel detained under similar circumstances, to New York, for the purpose of having the seizure adjudicated by the American law ; but the American authorities being of opinion that the papers under which The Eagle had been sailing were fictitious, and that the American flag and pass had been used for the purpose of covering the Spanish ownership, declined to interfere. Lieutenant Fitzgerald then resolved to send The Eagle to Sierra Leone for adjudication as Spanish property, engaged and fitted for the slave trade ; and accordingly he put Mr. Boys as an officer of The Buzzard, and a crew from that ship on board, in charge of The Eagle, and proceeded in The Buzzard, in company with The Eagle, towards Sierra Leone. In the progress of the voyage, The Eagle, having sprung a leak, foundered ; and Mr. Boys and his crew took to their boat, and were picked up by The Buzzard.

At Sierra Leone, Lieutenant Fitzgerald sufficiently proved the true character and ownership of The Eagle before the Mixed Commission Court ; and on the 27th January, 1840, a sentence was pronounced declaring The Eagle to have been a Spanish vessel engaged in the slave trade, and \* condemning the same as having been seized and taken by her Majesty's ship Buzzard.

The bounties authorized by act of parliament to be granted on tonnage in such cases were paid on application by the lords of the treasury to the agent of The Buzzard, amounting to the sum of 960*l*.

Under these circumstances, proceedings were instituted calling upon Mr. Woodhead, the agent of The Buzzard, to bring in the amount of the bounties he had received, and to show cause why the same should not be paid to the officers and crew of her Majesty's ship Lily as the original seizers.

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The case was argued on the second session of Trinity term, May 20th, by the *Queen's Advocate*, on behalf of The Buzzard; and by *Addams*, on behalf of the officers and crew of her Majesty's ship Lily.

In support of The Buzzard's claim the *Queen's Advocate* submitted — That a final and conclusive sentence had been pronounced in favor of The Buzzard by a court possessing an exclusive jurisdiction over the subject-matter of the question, namely, by the Mixed Commission Court at Sierra Leone. That, by the act of parliament 5 Geo. IV., c. 111, a "consolidated slave trade act," embodying the treaties between Great Britain, Spain, Portugal, and the Netherlands, it is expressly provided in the treaties therein set forth, "That the Mixed Commission Courts shall adjudge without appeal, according to the letter and spirit of the treaties;" and in a later treaty between Spain and this country, dated June 28, 1835, containing additional articles, principally \*relating to the fitting out of [\* 239] vessels for the purpose of the slave trade, it is stipulated in the third article in the following words: "The mixed courts of justice are to decide upon the legality of the detention of such vessels as the cruisers of either nation shall, in pursuance of the said treaty, detain; and such courts shall adjudge definitely and without appeal all questions which shall arise out of the capture and detention of such vessels." That under the provisions of these treaties, and also upon the authority of the decision in the Court of Delegates in the case of *The Donna Barbara*,<sup>1</sup> it was not competent for the court to disturb the sentence which had been pronounced by the commissioners at Sierra Leone, condemning The Eagle as having been seized and taken by her Majesty's ship Buzzard. That the jurisdiction conferred upon the Court of Admiralty by the 71st section of the act is confined to questions which may arise with respect to the distribution of the proceeds or bounties between the actual captors themselves. The question raised by The Lily in this present instance was clearly not of this class. It was of a totally different character, being in substance an appeal to the court to reverse the sentence of the Mixed Commission Court at Sierra Leone, and to decree that The Eagle was not in point of fact captured by The Buzzard, but by The Lily. The *Queen's Advocate* then commented at some length upon the facts and evidence in the cause; and, in conclusion, contended that both in fact and in law the officers and crew of The Buzzard were legally entitled to the bounties which had been paid to Mr. Woodhead, their agent, on their behalf, by the lords

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<sup>1</sup> [2 Hagg. Ad. R. 366.]

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[ \* 240 ] of the treasury. The Eagle having actually surrendered to The Buzzard, and the officers and crew of The Buzzard being in possession of a judicial sentence which the court had no authority to alter.

*Addams, contra*, argued — That in the mode of proceeding adopted on behalf of Mr. Woodhead, the agent for The Buzzard, there had been a departure from the usual practice of the court, inasmuch that if it was intended to raise an objection to the court's jurisdiction, an appearance should have been given for Mr. Woodhead under protest in the first instance, and the question should have been argued accordingly. That the conclusions which had been drawn from the several treaties, and from the case of The Donna Barbara referred to by Queen's Advocate, were erroneously founded. The obvious import of the treaties was to this effect: That the Mixed Commission Courts shall adjudge without appeal in all cases of seizure and detention between the subjects of the contracting countries. It never was intended that when a sentence of condemnation had been once pronounced in favor of British seizors, the jurisdiction of this court should be excluded from considering the question as to the persons to whom the bounties, or the proceeds arising from such condemnation, should belong. The words of the 71st section of the act 5 Geo. IV., c. 113, expressly exclude any such interpretation upon the import of the treaties, by providing, "that if any party or parties claiming any benefit by way of bounty or share of the proceeds for the seizure

of any Spanish, Portuguese, or Netherlands vessels for violation of treaty or convention, may resort to the Court of

[ \* 241 ] Admiralty for the purpose of obtaining the judgment of the said court in their behalf; and it shall and may be lawful for the judge of the said court to determine thereupon." That with respect to the decision of the Court of Delegates in The Donna Barbara, the case itself was not in point with the present case. The question in that case was not a mere question of distribution, but of the legality of the seizure; it went, therefore, to the very root of the original sentence pronounced by the court at Sierra Leone, and the Court of Delegates rightly held that the sentence of the Mixed Commission Court, being a sentence *in rem*, was conclusive, and without appeal in this court. That upon the facts of the case no doubt could be entertained that The Eagle, although she might actually have surrendered to The Buzzard, had been seized in the first instance by The Lily; that she was in the possession of an officer and crew of The Lily when Lieutenant Fitzgerald went on board in Clarence Cove; and the act of dispossessing Mr. Boys, and

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putting a prize crew from The Buzzard on board The Eagle after the surrender of the master, was a wrongful dispossession of the original seizors; and the officers and crew of The Buzzard were not entitled to take advantage of their own wrong, to the prejudice of the commander and crew of The Lily, by whom the capture was previously made, and to whom the bounties *de facto* and *de jure* belonged.

#### JUDGMENT.

DR. LUSHINGTON. This case was argued on the last court day, and the matter in dispute lies between the officers and crews of her Majesty's ships Buzzard and Lily. \*The ves- [ \*242 ] sel which was captured having been lost, previous to the proceedings in the Mixed Commission Court at Sierra Leone, no question can arise with respect to the proceeds. The question is confined to this single point, namely, who shall be entitled to the bounties arising from the sentence of condemnation which has been pronounced? Now it is expedient to examine, in the first instance, the facts of the case as they are stated in the evidence of Lieutenant Boys; and I must then consider what is the legal result of that evidence, and whether the act of parliament would bind me to any particular conclusion.

The evidence of Lieutenant Boys is to the following effect. [The court here adverted to the evidence at some length, and proceeded to observe,]—Such is the general statement of the facts of the case deposed to by Mr. Boys; and, in order to ascertain what were the reasons which induced Lieutenant Fitzgerald to make the seizure, I shall now proceed to notice some of the observations by which the evidence of the witness is accompanied. In his deposition in chief, on the third article of the allegation, he says:—“I made a communication to Lieutenant Fitzgerald, in regard to the peculiar situation I was placed in; and, in consequence of what I said to him, he seized The Eagle, as on behalf of The Buzzard, and, under a new and altered declaration, hauling down the American flag, and hoisting a Spanish flag in The Eagle. He removed me and my prize crew out of her, and placed a mate and prize crew from The Buzzard on board of her in our stead.” Upon cross-examination he states those facts more at length. He says, in his answer to the seventh interrogatory:—“I did \*not fall in with [ \*243 ] any of her Majesty's cruisers until I found her Majesty's brig Buzzard at anchor in Clarence Cove, on the 12th March, 1839. The Eagle, under the American flag, did on that day run into Clarence Cove, and within gunshot of The Buzzard; and Litty, the master, had, up to that time, persevered in asserting that the vessel

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was American property. I did report myself to Lieutenant Fitzgerald, commanding The Buzzard, in due course of service, as to my superior officer. I did acquaint him of my failure in attempting to procure the condemnation of The Eagle at Sierra Leone, and the reason of such failure, namely, the ostensible American ownership and flag of the said vessel. It was my intention, on finding a British cruiser in Clarence Cove, to abandon The Eagle there, and apply to be received with my crew as supernumeraries on board such cruiser."

Upon the eighth interrogatory he states:—"I did, with my crew, not voluntarily, but acting under the orders of Lieutenant Fitzgerald, but which orders I was glad to receive, quit The Eagle in Clarence Cove, and we were, not at our own request, but by order of Lieutenant Fitzgerald, received as supernumeraries on board The Buzzard. I never rejoined The Lily, or applied for that purpose, or forwarded to the commander of The Lily any official account or report of my proceedings as prize-master of The Eagle, in consequence of The Lily having quitted the coast and returned to England."

In answer to the ninth interrogatory he states:—"Lieutenant Fitzgerald himself went on board The Eagle in Clarence Cove. He did very closely investigate Litty, the master, in respect of the national character and ownership of The Eagle. The said [ \*244 ] \* Litty did, in consequence of such interrogation, and of being told by Lieutenant Fitzgerald that he would be probably taken to America, then for the first time confess that The Eagle and her cargo were the property of Spaniards residing at Havana, and that he, Litty, had been engaged as a nominal master, for the sake of his hoisting an American flag. The said Litty was very reluctant to make such a declaration. He had been questioned not so long as for three hours, but as long as for one full hour, before the said fact was elicited."

On the tenth interrogatory he says:—"The said Litty did, after declaring the said vessel and cargo to be Spanish property, hoist a Spanish ensign on board The Eagle. Lieutenant Fitzgerald did not take possession of The Eagle previous to the Spanish ensign being displayed thereon. He took possession of her as Spanish property. It was after the Spanish ensign was hoisted that Lieutenant Fitzgerald sent an officer and prize crew from The Buzzard on board The Eagle." Without entering further into the detail of the evidence of this witness, it may be shortly stated that the vessel, having so been taken possession of, was carried to America, and, upon her voyage back to Sierra Leone, she foundered at sea and was lost; and a condemnation was obtained, in the Mixed Commission Court

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at Sierra Leone, of that which, in point of fact, was not in existence at the time, for the purpose, it is to be presumed, of entitling the captors to the bounties under the act of parliament. Under this state of facts it is important to consider, in the first place, the position in which Lieutenant Boys was placed when he carried The Eagle into Clarence Cove. His position was this: He was the officer in command of The Eagle, \* under the authority [ \* 245 ] and orders of Commander Reeves. Was it then competent in Lieutenant Fitzgerald to remove him from that command, and immediately to make a seizure of the vessel for his own benefit? I apprehend not. In the course of my experience in this court, I do not recollect any case in which a similar attempt has been upheld, and it would, I conceive, be a dangerous principle to establish for the first time in the present case, that an officer in possession of a vessel captured by one of her Majesty's ships, should be dispossessed by an officer of another king's ship, for the purpose of enabling that officer to make a second seizure for his own use and benefit. Upon general principle, therefore, I am entirely of opinion, that if the second seizure in this case had been made by Lieutenant Fitzgerald immediately upon his ordering Lieutenant Boys to go on board The Buzzard, whatever trouble he might have taken afterwards in bringing the vessel to adjudication, the benefit must have enured to the original seizers. I must now consider in the next place, whether any circumstances intervened between the period of time when Lieutenant Boys was ordered on board The Buzzard, and the time when the second seizure was effected, which should induce a more favorable impression upon the judgment of the court as regards the claim of The Buzzard upon the present occasion. Now assuming that Lieutenant Boys was actually removed from The Eagle, before the conversation took place between Lieutenant Fitzgerald and the master of The Eagle, what are the circumstances disclosed in the evidence upon this part of the case? Lieutenant Fitzgerald goes on board the vessel, he interrogates the master for a considerable length of time, he \* threatens to carry him to the United States, and the master [ \* 246 ] then confesses, for the first time, that The Eagle is a Spanish vessel, and immediately pulls down the American flag and hoists the Spanish ensign. Do these facts constitute any distinction in the circumstances of the case which should induce the court to depart from the principle which would ordinarily be applicable to such second seizure? I am of opinion that they do not, and for this reason, that the national character of the vessel was not in the slightest degree altered by any thing that was said or done, and certainly not by the mere fact that an American flag was hoisted in the first instance, and was



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afterwards displaced by the Spanish ensign ; it does appear to me, and I avail myself of this opportunity to make the observation, that it never can be considered in these slave seizures that the carrying a flag only shall affix upon vessels a national character ; if it were so, there would be an end at once to the effect of all the treaties which Great Britain has made with Portugal, Spain, and other countries for the abolition of slavery ; for what would be easier than to carry an American flag on board, and to hoist that flag when the vessel was in the slightest danger of being captured ?

Having then arrived at the conclusion, that there was no alteration in the circumstances of the case between the time when Lieutenant Boys arrived in Clarence Cove and the surrender of The Eagle was made to Lieutenant Fitzgerald, before I decide to whom the bounty is due by law, it remains for me to consider, in the last place, the act of parliament and the effect of the treaties, which have been pressed upon the court by the counsel in arguing this case. Now it [ \* 247 ] is perfectly clear, that all the jurisdiction which this court can exercise upon the present question is derived from the act of parliament, 5 Geo. IV., c. 113. The 71st section of that act provides to the following effect,—" That any party claiming any benefit by way of bounty or share of the proceeds for the seizure of any Spanish, Portuguese, or Netherlands vessels, for violation of any treaty or convention, may resort to this court for the purpose of obtaining a judgment of the court on their behalf." These are the words of the statute, and this being a claim entirely confined to bounty, it certainly does appear that these words confer an ample jurisdiction upon the court to determine the present question. The act further sets forth, "that it shall and may be lawful for the judge of this court to determine thereupon." It has been said, that notwithstanding the terms in which this section of the act is framed, the words of the treaties are so strong, that condemnation having passed in the Mixed Commission Court to her Majesty's ship Buzzard, the court is precluded from examining the facts of this case ; and in support of this argument, the case of The Donna Barbara and the final adjudication of that case in the Court of Delegates has been cited. Now, in referring to the treaties, it is obvious that the only object which they have in view is to determine the rights of the subjects of the two contracting states when they are put in competition with each other. It would be wholly unnecessary to insert into a treaty, words affecting the rights of the subjects of one of the contracting states alone ; and it is strictly a matter of municipal legislation to determine who is entitled to a bounty which is to be paid out of the public revenues of the state by which such bounty is awarded. The

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words of the second \*treaty between this country and the [ \*248 ] government of Spain, upon which great stress was laid by the Queen's Advocate in the argument, are these: "The Mixed Courts of Justice are to decide upon the legality of the detention of such vessels as the cruisers of either nation shall in pursuance of the said treaty detain, and such courts shall adjudge definitely and without appeal, all questions which shall arise out of the capture and detention of such vessels." The question is, what is the meaning of of these words. In my apprehension the meaning is obvious, and they include nothing but what affects the subjects of the two contracting states. This interpretation of the words of the treaty is confirmed by the following consideration, that the government of Spain could have no concern in the distribution of bounties awarded by this country to British subjects who may effect captures; it cannot interest the Spanish government to investigate upon what principles these bounties are given, or by what rules they are distributed. I consider, therefore, that the object and the effect of the treaty is this, namely, to determine under what circumstances a violation of the treaty had taken place, and the vessel thereby became liable to condemnation; that where it has been decided that a vessel has been rightly condemned, all further inquiry is immediately excluded, and where a vessel has been acquitted, no further investigation shall be allowed. It has been argued, that in the case of *The Donna Barbara*<sup>1</sup> a different view of this subject was taken by the Court of Delegates. I have no knowledge upon what principles that case was decided by the court, but it is easy to perceive that the grounds upon which the judgment in that case was founded do \*not interfere at [ \*249 ] all with the present case. The question in *The Donna Barbara* was whether any bounty was due or not, and whether the vessel by which the capture was effected, was legally authorized to make the capture. That was the case of *The Donna Barbara*, and it is obvious that the question which it involved was fairly within the scope and purview of the treaty. The treaty specifically provides that search and capture shall only be made by vessels specially authorized and appointed for the purpose, and it is a matter for investigation before the Mixed Commission Court, whether a capture has been made by a vessel entitled to effect it or not. Upon this ground, it was lightly considered by the Court of Delegates that *The Donna Barbara* was a case exclusively within the jurisdiction of the Mixed Commission Court at *Sierre Leone*, and that as such the sentence of the com-

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<sup>1</sup> [2 Hagg. Ad. R. 366.]

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missioners in that case was conclusive, and not open to further investigation in the appellate courts of this country. I do not feel, therefore, that the case of *The Donna Barbara* presses me to arrive at a different conclusion from that which the facts of this case and the reasoning upon it originally induced me to entertain. On the contrary, I think that it is peculiarly my duty to determine who are the real captors, and who are the parties legally entitled to the bounties which have been granted upon the seizure of this vessel in the present instance. In this opinion I am confirmed when I look to the act of parliament and the words of the 71st section. In that section I find it provided, "that it shall and may be lawful for this court to

hear and determine any question of joint capture which may [ \* 250 ] arise upon any seizure of slaves, &c." \* How am I to decide a question of joint-capture, if the condemnation of the *Mixed Commission Court* is to be considered as final? If the construction which it has been attempted to put upon the words of the treaty by the counsel for *The Buzzard* were correct, the jurisdiction which is thus expressly conferred by the act of parliament upon this court would be altogether nugatory. The effect of such a construction would render the provision of the statute wholly inoperative, and leave no power to this court of doing justice to British subjects, in a matter which the legislature has expressly confided to its cognizance, and with which the *Mixed Commission Court* has nothing whatever to do. I am therefore of opinion, that under the circumstances of this case, I am bound to hold that this capture must be considered as the capture of the original seizor; that it was not competent in Lieutenant Fitzgerald to dispossess the officer placed in command of the prize by Commander Reeves, and that having so removed him without legal authority, Lieutenant Fitzgerald is not entitled to any benefit for the condemnation of the vessel. I therefore pronounce for the claim of Commander Reeves, and the officers and crew of *The Lily*, which he commanded. I shall, however, allow to Lieutenant Fitzgerald the costs which he has incurred in procuring the sentence of condemnation at Sierra Leone.

THE ARMADILLO, Benedict.<sup>1</sup>

[ \*251 ]

June 17, 1841.

A bond of bottomry sought to be enforced prior to the arrival of the ship at her port of destination, upon the ground :

1st. That the advances for which the bond was given had been obtained from the bondholder by the fraudulent misrepresentations of the master.

2d. That the payment of the bond had become due by unnecessary delay and deviation in the progress of the voyage. Claim of the bondholder dismissed with costs.<sup>2</sup>

THIS was a cause of bottomry, in which it was alleged that the bond had become due prior to the arrival of the ship at her port of destination, in consequence of the fraudulent conduct of the master, and the unnecessary detention and deviation of the vessel in the progress of her voyage.

The vessel, an American vessel, having struck upon a rock at the mouth of the river Tyne, whilst on her homeward voyage to New York, was compelled to put back for the purpose of repairing the damage she had sustained. She arrived at South Shields upon the 28th November, 1840; and the master, being without funds, applied to Mr. Jackson, a merchant of Newcastle, with whom he had been previously connected in the concerns of the ship, to make the requisite advances for the repairs. Upon the 21st January, 1841, a bottomry bond was executed by the master in favor of Mr. Jackson, in the sum of 384*l.* 3*s.* 7*d.*

The bond, after reciting in the usual terms the necessities of the vessel, and the receipt of the money advanced, set forth, that the money so advanced was to run at *respondentia*, on the block of the brig, "from the port of Newcastle to the port or road of New York, having permission to touch, stay, and proceed to all ports and places within the limits of the voyage."

On the 22d of January, the vessel having been refitted, again set sail, and in the prosecution of her voyage she touched at Deal. Here the master, finding her to be in a leaky condition, remained for seven or eight days in the Downs, and then carried \*her [ \*252 ] into the port of Cowes, where she arrived upon the 2d of February.

Upon the 3d of February a survey was made of the vessel while she was afloat in the harbor of Cowes, and the surveyors reported it to be necessary that the cargo should be discharged and the ship

<sup>1</sup> [S. C. 1 Notes of Cases, 75.]

<sup>2</sup> [See *The Draco*, 2 Sumn. 157.]

should be taken into dock for the purpose of undergoing a more accurate survey.

The cargo was accordingly discharged, and the master proceeded to sell the coals to defray the expenses of the surveys and the repairs. On the 8th February Mr. Jackson, arrived at Cowes, and having obtained an injunction from the Court of Chancery, the sale of the coals was stopped, and the master was subsequently arrested at the suit of Mr. Jackson. Various injunctions were also applied for and obtained *ex parte* by the owners of the cargo, but were ultimately dissolved with costs. On the 9th of March a second survey was made, and an estimate of the repairs was given in; but before any repairs were commenced the vessel was arrested in this cause, at the suit of Mr. Jackson, the bondholder.

The act on petition of the bondholder, *inter alia*, set forth at some length the transactions which had taken place between Mr. Jackson and the master prior to the return of The Armadillo to South Shields on the 28th of November, and alleged, that in the course of those transactions the master had misrepresented the ship as belonging to Eastman & Co., of New York, and had given a bill of exchange upon them in that character; that the bill of exchange had been returned dishonored; the members of that firm having some time previously absconded from New York in insolvent circumstances. That [ \* 253 ] the vessel never did belong to them, but was \* the property of a Mr. Campbell, and that the master had also kept back from the knowledge of Mr. Jackson the existence of a bottomry bond upon the ship prior to her arrival in this country; it also set forth that the delay in the Downs, and the resort to Cowes, was unnecessary. That Cowes was not within the limits of the voyage contemplated in the bond. That no intimation of his proceedings in delaying the ship in the Downs, or carrying her into Cowes, was given by the master to the bondholder, or the owners of the cargo. Lastly, that the second survey, upon the 9th of March, was a mere pretended survey; that the detention of the vessel at Cowes in its commencement and duration was unnecessary and improper, and was not justified either by the state of the brig or by any other circumstances; that the damage she had sustained had arisen from the misconduct of the master, and that there was no prospect of her ever being able to put to sea again, and to complete her voyage without undergoing repairs, nearly amounting to the present value of her hull and rigging, and which can only be effected by taking up a further sum of bottomry, to the great loss and injury of the bondholder, and of the several owners of the cargo.

The case was argued by

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*Nicholl and Harding*, for the bondholder.

*Addams and Robinson*, *contra*.

JUDGMENT.

DR. LUSHINGTON. The question which I am called upon to determine in this case, resolves itself into these two points : first, that the master never *bonâ fide* intended to proceed with the vessel to his avowed port of destination ; and, secondly, that the [ \* 254 ] bond has become due by an unnecessary delay in the prosecution of the voyage, and a deviation from the proper course. In the arguments which have been addressed to the court, it has also been suggested that the bond was given by the master with a fraudulent intention of evading the liabilities of his vessel under the provisions of the statute 5 & 6 Victoria ; and that the bondholder was imposed upon by false and undue misrepresentations ; and upon these grounds, as also upon the grounds to which I have adverted, it has been contended that Mr. Jackson is entitled to recover the money which he has advanced under the equitable construction of the 5th section of the statute, which gives to this court a jurisdiction to enforce the payment of necessaries which have been supplied to a foreign ship. Looking to the circumstances which are stated to have occurred at Newcastle, I do not think that there is any ground for a proceeding under the statute, and for this reason, that I cannot find in the facts disclosed any evidence to satisfy my judgment that there was originally any fraudulent intention on the part of the master of this vessel. Still less do those facts lead me to the conclusion that the advances for which this bond was given were procured by the master by the misrepresentations which he is alleged to have made in his original dealings with the bondholder. I do not see how Mr. Jackson was in any degree prejudiced by the representations of the master that Eastman & Co. were the owners of the vessel, even supposing that they were not the real owners. Again, with respect to the asserted suppression of the existence of the former bond ; it is to be observed, \* that although Mr. Jackson swears in [ \* 255 ] his affidavit that the ship's papers were sedulously kept back, yet he does not state that he made any attempt to inspect those papers. It is not suggested that free access was at any time denied for the inspection of the ship's papers ; and I am at a loss to understand that Mr. Jackson would have met with any greater difficulty in examining the papers in November, 1840, than he experienced in inspecting them in the following month of December. However this might be, it is clear that these facts would only affect the

advances which were originally made. Upon the subsequent advances they could have no operation, for with these facts, as he states, then perfectly known to him, he proceeds again to intermeddle with the concerns of the vessel, and voluntarily takes upon himself the further advances for which this bond was eventually executed.

I now come to the assertion which has been advanced in the argument, that the master never *bonâ fide* intended to proceed with the vessel to New York ; and I may here observe, that if it should appear that he had no such intention, and if his conduct after quitting Newcastle is tainted with fraud, and he never intended to complete the voyage, I should have no hesitation in pronouncing the bond to be due. The general principle undoubtedly is, that a bond does not become payable until the voyage for which it is given is completed ; but if a master, after setting out on a voyage, fraudulently neglects or refuses to proceed with the vessel to the place to which she was destined, I entertain no doubt whatever that the bond becomes

instantly due, and payment may be enforced upon it by [ \* 256 ] proceedings in this court. How far, then, do the \* facts and circumstances of the case sustain the imputation that has been cast upon the intentions of the master in the present instance ? In support of the assertion much reliance has been placed upon the circumstance that the vessel was detained by the master in the Downs for a period of seven or eight days ; and it has been argued that this delay was altogether unjustifiable, and that any unnecessary delay would cause a bond to become due, and render the payment of it liable to be enforced in this court. The question, therefore, arises, was the master, in so remaining in the Downs, guilty of a delay not justified by the circumstances of the case ? The facts of the case, in my view of them, do not enable me to come to any such conclusion. Whatever might have been the condition of the vessel when she left Newcastle, it is, I think, perfectly clear, from all the affidavits as to the surveys and examinations which were made upon her, that the vessel was leaky when she reached the Downs ; and considering that she was destined to cross the Atlantic in a stormy period of the year, I can see nothing in the nature of fraud or unjust delay on the part of the master in remaining in the Downs, for the purpose of ascertaining whether the leak was of such a character as to endanger the ship and the lives of those on board if she prosecuted her intended voyage without undergoing further repairs.

Having thus disposed of this point in the case, I have now to consider another ground upon which it is contended that the immediate payment of this bond may be enforced, namely, that by taking the vessel into Cowes, the master has deviated from his proper course,

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and the conditions of the bond have been \*violated by [\*257] such a deviation. In the course of the argument upon this part of the case, it was much insisted upon that it had been distinctly stated in the act on petition, that the port of Cowes was not within the limits of the voyage as described in the bottomry bond; and it has been said that this averment being altogether uncontradicted in the reply to the act, the court must assume as an admitted fact in the cause that Cowes was out of the limits of the voyage. Now, as a general principle, it is undeniable that where a fact is averred and there is no contradiction of that fact, the court will *prima facie* assume such an averment to be true. In applying this principle, however, in the present instance, a doubt suggest itself to my mind, whether the assertion that Cowes was not within the limits of the voyage is an averment of fact at all. In my judgment it appears to me to be rather a statement of what is considered by the party proceeding in this cause to be the law; in other words, to be a question of law depending upon admitted facts. If this view of it be correct, it is clear that the principle contended for cannot apply; for I never yet heard it maintained that because one party has stated a proposition of law in an act on petition, that proposition was to be taken for granted, unless there was an express denial of it on the other side. If the decision of this case depended entirely upon the fact whether Cowes was or was not within the limits of the voyage, I should have been extremely desirous to be supplied with some information from persons well acquainted with these matters as to the view which would have been taken of it if a policy of insurance had been effected upon this ship. If I had to decide the question upon my \*own judgment, without reference to [\*258] other circumstances, I confess that I should have much hesitation in concluding that the port of Cowes, looking to the situation in which the master was placed, could be considered as out of the limits of the voyage. But I am not called upon to make any such decision upon the present occasion. There are other facts and circumstances which must form a part of the question in determining my judgment upon it. It has been urged in the argument that the master might have gone into Ramsgate or Dover; and that those ports were within the limits of the voyage. Under ordinary circumstances this argument might be entitled to some consideration. But what was the situation of the master, and what the condition of his vessel at the time? He was in want of immediate repairs, and, looking at the season of the year, and the probable state of the weather, it was his duty to carry his vessel into that port which was most easily accessible, and the most convenient for obtaining the necessary



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repairs, and the examinations requisite prior to those repairs being made. Were these important objects likely to be obtained by a resort to the port of Cowes? The answer to this inquiry, it appears to me, is strongly in favor of the course adopted by the master. It is well known that the dockyards at Cowes furnish many conveniences for the efficient examination and repair of damaged vessels; it is also to be borne in mind, that it appears to have been the nearest port in point of distance from the place where this vessel was lying at anchor in the Downs; and I have not heard it even suggested in argument,

that by carrying his ship into Cowes the master in any de-  
 [ \* 259 ] gree prolonged the probable duration \* of his voyage. Under the circumstances of the case therefore, I cannot but think that, whether strictly within the limits or out of the limits of the voyage, the master exercised a sound discretion in proceeding to Cowes, and that he was most fully justified in so doing.

It remains for me lastly to examine the facts which occurred after the arrival of the vessel at Cowes, and to consider their bearing and effect upon the question which I am now called upon to determine. It appears that, on arriving at Cowes, a survey was immediately made, and the unloading of the cargo was recommended for the purpose of effecting a complete and more minute examination of the ship's condition. The vessel was accordingly unloaded, and during the progress of the unloading the master proceeded to sell the coals taken on the ship's account, to defray the expenses of the surveys and of the repairs which might be requisite.

An injunction to restrain the sale of the coals was obtained by Mr. Jackson, who arrived at Cowes upon the 8th of February, and at his suit the master was subsequently arrested. Prior to his arrest, negotiations had been carried on between the master and Mr. Jackson, and in a letter bearing date the 10th of February, 1841, a proposition was made by the master to the following effect:—"I will make this proposal to you; as my vessel is indebted to you some 600 or 700*l.* sterling, if you will advance a sufficiency of funds to repair her so that she can proceed to her destined port, I will give up the coals to you for your drafts on Eastman & Co., and by your taking another bottomry on her, I will bottomry my cargo, which is valued at 5,000*l.*, to secure you on both bottomries; and if you cannot com-  
 [ \* 260 ] ply with the \* above, I can do nothing more for you." Now the effect of this letter, in my view of it, has a most important bearing on the case before the court. I see no reason whatever to distrust the sincerity with which it was written, and looking to the terms in which the proposition to Mr. Jackson is drawn up, it disposes, in my judgment, most satisfactorily of the imputation which

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The Armadillo. 1 W. Rob.

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has been advanced against the master, that he did not *bond fide* intend to proceed to his port of destination. It is also important in another point of view as furnishing convincing evidence of the honest inclination of the master to act fairly for the benefit of the owners, and at the same time to protect, to the utmost of his ability, Mr. Jackson, the bondholder, by offering him the best security which it was in his power to give under the difficult circumstances in which he was placed. The remaining facts upon this part of the case are few, and may be very shortly stated. Various injunctions, it appears, were obtained by the owners of the cargo, which were ultimately dissolved, with costs; and upon the 9th of March, the master having been arrested on the 3d, a second examination of the vessel was made in the dry dock, preparatory to the commencement of the actual repairs.

The delay which thus intervened between the master's arrival at Cowes, upon the 3d of February, and the second survey of the vessel, has been much commented upon as carrying a fraudulent appearance. In my opinion, the affidavit of Mr. Day, which is before the court, supplies a sufficient explanation. (The court, after reading the affidavit, proceeded to say) — Other reasons explanatory of this delay might, I think, if it were necessary, be found in the circumstances of the master's arrest, and the various \*injunctions [ \* 261 ] which were applied for by the owners of the cargo. Some of these injunctions, it appears, after being dissolved by the Vice-Chancellor, were carried by appeal before the Lord Chancellor, and were not finally decided until the 16th of April. It is impossible to conceive that these circumstances would not have materially interfered with the active advancement of the measures necessary for the examination and repairs of the vessel, and I must consequently hold that there is not sufficient ground for attaching upon the master the blame of the delay which it has been endeavored to fix upon him. With respect to the survey of the 9th of March, objections have been taken both as to the manner in which it was made and also to the nature of the report returned by the surveyors who were employed upon it. The survey has been characterized as a mere mock survey, and complaints have been made that Mr. Spain, a surveyor at Lloyd's, whose services were engaged in making the first survey, was not employed in the second inspection of the vessel. It is here to be noticed that Mr. Spain is stated and admitted to have acted and to be still acting as the agent of Mr. Jackson, the bondholder, and of the owners of the cargo; and it has been contended by Mr. Jackson's counsel that this very circumstance furnishes a strong reason why he should have been permitted to assist in the second survey. In ordi-

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The Armadillo. 1 W. Rob.

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nary cases, perhaps, I should be disposed to admit the propriety of this argument; but when I look to the facts of this particular case, I cannot leave out of my consideration the proceedings which had been carried on in chancery, the hostility of the respective parties, and

the part which Mr. Spain himself has taken in serving the  
[ \* 262 ] protest upon the master, and in doing \* other acts connected with his duties as agent. Looking to these circumstances,

I cannot accede to the proposition that Mr. Spain was a proper person to have been appointed to survey this vessel; and I cannot think that he was entitled to assume the character of a disinterested person in the business deriving weight and authority from the station he holds as an authorized surveyor of Lloyd's at the port of Cowes. I now come to the second and more important objection which has been raised to the report of the surveyors as regarding the practicability of any efficient repairs being done to this vessel; and here statements have been made which I must confess are somewhat startling. In support of the bondholder's case, it has been represented that the vessel is now in such a condition that all repairs would be useless, and affidavits have been produced to verify this assertion, which directly tend to show that, even prior to her quitting the port of Newcastle, the unsoundness and decay of this ship was such as to render her altogether unseaworthy. To these affidavits I will briefly refer, and first to the affidavit of William Garill, who describes himself as a surveyor of shipping at South Shields. He swears in these words, — "that he inspected the brig Armadillo while in Mr. Young's dock, at South Shields; and in the deponent's judgment, the said ship, from her state of unsoundness and decay, was not capable of being repaired so as to render her fit to traverse the Atlantic Ocean." Now I must say that if the belief here expressed of the rottenness of this ship was the real impression upon the mind of this witness, when he made the survey upon her at South Shields, it would have been only consistent with common humanity if he had communicated the fact before she left the port of Newcastle.

[ \* 263 ] \* The expression of this opinion, for the first time, in the affidavit to which I have referred, is a circumstance which is not calculated to enhance its authority with the court in the present instance. There is also another affidavit which is still more remarkable, namely, the affidavit of Mr. Young, a ship-builder. In the first part of his affidavit, he swears "that the vessel was taken into his dock, and was there properly and effectually repaired to the satisfaction of Matthew Popplewell, the Lloyd's surveyor at South Shields, who inspected her previously to her leaving the said port, and reported her seaworthy." In a subsequent part of his affidavit, refer-

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The Armadillo. 1 W. Rob.

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ring to a statement of the ship's condition at Cowes, which had been submitted to him for his inspection, he swears "from his experience and knowledge of business, he is competent to form a belief, that, without accident or bad weather, it is perfectly impossible that any vessel, after being so properly and effectually repaired as the said brig was at Shields, in the deponent's dock-yard, could be in the condition described by the master, unless from the rotten and decayed state of her timbers, and insufficient shifting of her planking, previous to the accident which occasioned her being brought into the deponent's dock-yard for repairs." Now certainly I must hesitate before I give credit to a statement which, according to this individual, supposes that a vessel which he himself repaired was seaworthy, "unless from the rotten and decayed state of her timbers."

In my judgment these two affidavits are utterly inconsistent with the facts stated by Mr. Young himself, and the survey made by Mr. Popplewell. Mr. Popplewell, it is to be remembered, is the authorized surveyor of Llc'd's at the port of South Shields. I apprehend, therefore, that \*I must [ \*264 ] consider the survey made by him not merely as having been made *bonâ fide*, but by a person duly qualified. Can it be possible that he would have made a survey merely to ascertain that the work had been properly done without paying regard to the substantial condition of the ship with respect to her timbers, and that he would certify that she was perfectly competent to traverse the Atlantic to New York, when, in point of fact, she was rotten? If that were so, I should be inclined to come to the conclusion that a survey was a useless mode of proceeding, or that the person who made it was very incompetent to his duty. I am therefore bound to assume that the vessel when she left Newcastle was in a seaworthy condition. With respect to the extent of her present damage and the capability of her being effectually repaired, there is an affidavit made by the three persons who surveyed her, stating that the whole expenses would not exceed 100*l*. There is also another affidavit made by a person describing himself as shipwright surveyor to Lloyd's New Register Book for the port of Portsmouth, who states that the ship is perfectly worthy of repair, and that the repairs necessary to put her in a seaworthy condition will not exceed the sum of 150*l*.

Upon this part of the case, therefore, I am clearly of opinion that there is no evidence before the court which should induce me to believe that the master had any fraudulent intention with regard to the repairs of his vessel, or that the condition of the ship is such as would render the expense likely to be incurred inconsistent with the

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The Hope. 1 W. Rob.

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interest of the owners of the vessel. I am well aware that the taking up of a second bottomry bond by the master may be exceedingly detrimental to Mr. Jackson, but I cannot \*give any consideration to this circumstance in deciding the present case. I have yet to learn that the court, unless the case be connected with fraud, has any authority to interfere with the master's right to take up a second bond of bottomry, or to prevent him from using his utmost exertions for the completion of his voyage. As regards any asserted hardship upon Mr. Jackson, it must be remembered that the large interest of 25*l.* per cent. which he has demanded upon the advances he has made, has been taken by him upon this very account, namely, that the vessel might possibly meet with further accident in the course of the voyage to New York, and a later bond be taken which would be entitled to the priority of payment.

With respect to the application which has been made to the court to direct a new survey of the vessel, I see no ground for any further proceedings in the cause.

Mr. Jackson has, in the judgment of the court, proceeded against the master and the ship with a severity not justified by the circumstances of the case. I think that he has no ground for resorting to the jurisdiction of this court, and no claim upon its justice or its equity.

I shall, therefore, order the warrant to be superseded, and condemn Mr. Jackson in the costs of the proceeding.

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### THE HOPE.<sup>1</sup>

July 8, 1841.

Construction of the stat. 3 & 4 Vict. c. 65, s. 5; where an award has been made by magistrates in a cause of salvage, the parties are not at liberty to resort to the Court of Admiralty for a distribution, unless an application should have been made in the first instance to the magistrates for an order of distribution.

The application to the magistrates must be made either at the time when the award is made, or within fourteen days afterwards.

In this case a salvage remuneration, amounting to the sum of 250*l.*, has been awarded by the magistrates of Hull to the owners,

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<sup>1</sup> [S. C. 1 Notes of Cases, 110.]

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The Hope. 1 W. Rob.

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master, and crew \* of a fishing smack, for services rendered [ \* 266 ] to The Hope. The money awarded had been paid by the owners of The Hope to the owner of the smack, and no distribution had been made by him, nor was any portion of the money which he had received paid over by him to the master and the rest of the crew.

A monition was extracted by the master and crew under the provisions of the statute 3 & 4 Victoria, c. 65, calling upon the owner of the smack to bring in the money so retained by him, and to abide the decision of this court with respect to its final distribution.

The master had died since the monition had been served upon him, and the monition was revived against his executors.

It appeared that the award of the magistrates at Hull was unaccompanied by any decree for distribution, and that no application had been made to them to make any decree for that purpose.

Under these circumstances, an appearance was given for the executors of the deceased master under protest, and the question was raised whether, in cases of awards by magistrates, the court had any jurisdiction under the statute 3 & 4 Victoria, to compel an owner, into whose hands a salvage award had been paid, to bring in the same into the registry of the Court of Admiralty, unless application for a decree for distribution should have been made to the magistrates by whom the original cause was decided, either at the hearing or within fourteen days after the hearing of the cause.

In support of the protest, *Queen's Advocate* and *Nicholl*.

*Addams* and *Robertson, contra*.

\* PER CURIAM.

[ \* 267 ]

DR. LUSHINGTON. In disposing of any difficulty which may arise upon the construction of an act of parliament, it is expedient to consider in the first instance the general character of the statute itself, and the particular purposes for which it was enacted. Applying this principle to the statute which has been discussed in this case, it is perfectly clear, to my mind, that the fifth section of the act 3 and 4 Victoria, c. 65, under which this monition has been taken out, was intended to prevent the abuses which existed under the ancient law with regard to the distribution of salvage awards. It frequently occurred, in cases where payments had been made either under a salvage award or by private settlement and agreement, that the owners of the salving vessels retained in their own hands the money which had been paid, or made an arbitrary distribution of it

between themselves and crews, thereby in effect constituting themselves the judges in a matter affecting their own individual interests.

Before the recent statute passed, the owners were enabled to do this in many instances with perfect impunity, for no direct process lay from this court to control them by compelling distribution. This was the evil which the fifth section of the act was intended to remedy.

It has been stated in the present case, that there has been no application to the magistrates for any order of distribution in the first instance, and that the money which has been awarded by the magistrates at Hull has not been paid in compliance with the terms of the magistrates' award to the master but to the owner of the fishing smack. The latter circumstance, it appears to me, can

[ \* 268 ] make no \* alteration whatever as regards the jurisdiction of this court; for even assuming that the money has been paid to the owners instead of and not to the master, as directed by the terms of the award, Garrard, the master, having given no discharge for the amount awarded, may be entitled to recover it from the parties originally directed to pay it, namely, the owners of the ship to which the salvage service was rendered. Previous to the passing of this act, the jurisdiction of this court over awards of magistrates, or commissioners, in cases of salvage, was a mere appellate jurisdiction; with the question of appeal came also, as incidental, the question of distribution; but it was only when annexed to an appeal from an award that the question of distribution could be litigated in this court. The jurisdiction of the court has been enlarged in this respect by the passing of the statute 3 and 4 Victoria.

What then is the additional power and authority conferred upon the court by the fifth section of the act, and under what circumstances is this power to be exercised? The words of the fifth section are these. (The court here referred to the words of the fifth [ \* 269 ] section, and proceeded to observe)<sup>1</sup> — The \* question then

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<sup>1</sup> The fifth section of the act 3 and 4 Victoria, c. 65, is in these words: " And be it enacted, that whenever any award shall have been made by any justice of the peace, or by any person nominated by them, or, within the jurisdiction of the Cinque Ports, by any commissioners, respecting the amount of salvage to be paid, or respecting any claims and demands for services or compensation which such justices and commissioners within their several jurisdictions are empowered to decide, under the provisions of two acts passed in the second year of the reign of King George the Fourth, for remedying certain defects relative to the adjustment of salvage, or wherever any sum shall have been voluntarily paid on any such account of salvage, services, or compensation, it shall be lawful for any person interested in the distribution of the amount awarded or paid, to require distribution to be forthwith made thereof, and the person or persons by whom such amount shall be awarded, or, in the case of voluntary payment, the per-

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The Hope. 1 W. Rob.

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arises, are not the words "it shall be lawful, &c.," to be regarded in the nature of a condition precedent; and do they not render it imperative upon parties seeking to avail themselves of the process of the court under the provision of the statute, to show that a demand has been made upon the magistrates for a distribution in the first instance? It is perfectly clear from the wording of the statute, that when an application has been made to the magistrates, it is their bounden duty to direct a distribution. It is also equally clear that the application must be made within fourteen days from the date of the award, otherwise there could be no appeal to this court. The question then comes to this: can I enforce this monition, and at once \*proceed to decree a distribution of the money, [ \* 270 ] when all the circumstances of the case are not before me?

The words of the statute, in my view of them, do not entitle me to take upon myself the exercise of any such authority.

I am of opinion that, under the provisions of this act, an application to the magistrates for an order of distribution must precede the institution of proceedings in this court. It seems to me that it was the intention of the legislature, that a party requiring distribution to be made in a case, where there had been an award, should be bound to apply to the magistrates at the time the award is made, or within fourteen days after it has been given; that the magistrates by the terms of the act are to cause the account of the distribution to be annexed to the award, and to certify the same under their hands and seals; and it is not until this has been done, that a party dissatisfied with an award and distribution may resort to this court. In my judgment this is the proper construction of the intention of this act; and I therefore must pronounce, that, as no previous application has

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son by whom the same shall have been received, shall forthwith proceed to the distribution thereof among the several persons entitled thereunto, to be certified in the case of an award under the hand of the person or persons by whom such amount shall be awarded, and an account of every such distribution shall be annexed to the award; and if any person interested in the distribution shall think himself aggrieved on account of it not being made according to the award or otherwise, it shall be lawful for him, within fourteen days after the making of the award or payment of the money, but not afterwards, to take out a monition from the said high Court of Admiralty, requiring any person being in possession of any part of the amount awarded or voluntarily paid, to bring in the same to abide the judgment of the court concerning the distribution thereof; and in the case of an award, the person or persons by whom the award shall have been made, shall upon monition send without delay to the said High Court of Admiralty, a copy of the proceedings before him or them, and of the award, on unstamped paper, certified under his or their hand, and the same shall be admitted by the court as evidence, and the amount awarded or voluntarily paid shall be distributed according to the judgment of the court."



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The Duke of Sussex. 1 W. Rob.

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been made to the magistrates to distribute this salvage money, the terms of the act have not been complied with; I must therefore sustain the protest and decline making any further order as regards the monition.

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THE DUKE OF SUSSEX, Forss.<sup>1</sup>

November 4, 1841.

A steam-tug employed in towing a vessel in the river Medway, held not responsible for a damage occasioned by the vessel in tow coming in contact with another vessel. The vessel in tow having a licensed pilot on board at the time, and no error or negligence being established on the part of the crew of the steam-tug.<sup>2</sup>

THIS was a cause of collision, promoted on behalf of her Majesty, in her office of admiralty, against the steam-vessel *The Duke of Sussex*, for damage occasioned under the following circumstances. [ \* 271 ] \* Upon the 14th June, 1840, her Majesty's ships *Thalia* and *Africaine* were lying at their moorings in the river Medway, when the steam-vessel, having in tow *The Chieftain*, a timber ship heavily laden, and with a licensed pilot on board, was perceived coming round Cookham Wood Point, the tide being at the time not half flood, and the weather fine and clear. When the steamer was about sixty yards distant from *The Thalia*, some person on board *The Chieftain* was heard to call out to the steam-vessel to port her helm, notwithstanding which she continued her course until she was abreast of *The Thalia's* chestrees; in consequence thereof the vessel in tow came "end on," into the bows of *The Thalia*, and drove her against *The Africaine*, damaging both vessels.

This was the case set up in the act on petition. The reply, on the part of the owners of *The Duke of Sussex*, denied that any order was given or heard by the persons on board to port the helm; and it also alleged that, at the time of the collision, *The Duke of Sussex* was under the directions of the duly licensed pilot on board *The Chieftain*, and that, if the collision was not altogether accidental, it was attributable to such pilot, or to the persons on board *The Chieftain*.

*Queen's Advocate* and *Phillimore*, for the crown.

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<sup>1</sup> [S. C. 1 Notes of Cases, 161.]

<sup>2</sup> [See observations on this case in *The Duke of Manchester*, 2 W. Rob. 478, 479; *The Christina*, 3 W. Rob. 27.]

*Addams and Curteis, contra.*

## JUDGMENT.

DR. LUSHINGTON. Although the damage in this case is of small amount, the question involves a point of law of considerable importance. Under the circumstances of the case, it cannot be contended that the collision arose from inevitable accident; blame must, therefore, attach somewhere. The questions, then, for consideration \*are these: first, whether the collision occurred [ \*272 ] through the error or neglect of the steamer; or, secondly, whether it arose from the default of the pilot on board *The Chieftain*, or the mismanagement or misconduct of the master and crew of that vessel. These are questions of fact, upon which the decision of the court must be guided by the nautical experience of the gentlemen by whom the court is assisted.

In the course of the argument it has been contended, by the counsel for the crown, as a principle of law, that the owners of the steam-vessel would be responsible, in the present instance, for the damage in question, although she obeyed the directions of the pilot on board *The Chieftain*. On the other hand it has been urged, by the counsel for the owners of the steam-vessel, that her master and crew were bound to obey the directions of the licensed pilot on board *The Chieftain*; and if they did so, the owners of the steam-vessel were not responsible for any consequences that might result from an obedience to such orders. Now I am of opinion that the counsel for the crown cannot sustain the position which they have thus advanced. Where a licensed pilot is taken on board a vessel, in pursuance of the statute, and his directions are duly executed and obeyed by the master and crew, the owners are exonerated from any consequences that may result from the orders of such pilot. Such is the law with regard to vessels under ordinary circumstances, when not in tow of a steam-vessel. And here I may observe that, by a recent decision in the Court of Exchequer, it is not necessary, in order to exonerate owners, that the pilot should have been taken on board under the compulsory clauses of the act. Whether the pilot be taken \*on board in obedience to the compulsory enactments of [ \*273 ] the statute, or under certain other clauses, a responsibility for damage, occasioned by the default of the pilot, does not attach to the owners of the vessel. Does, then, the circumstance of a vessel being in tow at the time in any degree alter the liability of the parties? I apprehend not. What would be the consequence of taking the responsibility from the pilot on board a vessel in tow, and casting it upon the steamer? Its immediate effect would be a conflict of

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The Duke of Sussex. 1 W. Rob.

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authorities, which would lead to inextricable confusion and be highly prejudicial to the owners of vessels.

Under the existing law, if a licensed pilot is on board and his orders are obeyed, the owners are absolved from responsibility for damage occasioned by such vessel; but if the pilot was to be deprived of his authority, and the steamer was not bound to follow his directions and a collision ensued, the steamer would be the agent of the owners of the vessel in tow, and the owners of that vessel would no longer be protected by the act of parliament. In point of law, then, I am of opinion that the responsibility for the due navigation of *The Chieftain* did not rest with the steamer proceeded against in the present instance, but with the pilot who was on board *The Chieftain* at the time; and if it should appear that there has been no error or negligence on board the steamer, and that the orders of the pilot were properly executed, I must hold the owners exonerated from the consequences of the accident which has occurred upon the present occasion.

The *Trinity* Masters being of opinion that there had been no default on the part of the steamer, the court pronounced against the claim set up by the crown. With respect to the costs, the [ \* 274 ] learned judge \* observed, that although there had been much wavering upon the subject, he apprehended the true principle to be, that the crown neither gave nor took costs.

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### THE DUKE OF SUSSEX, Forss.<sup>1</sup>

November 4, 1841.

Rule of navigation, with regard to steam-vessels approaching each other on different courses.

When two steam-vessels must unavoidably and necessarily cross so near, that, by continuing their respective courses, there would be a reasonable probability of a collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other. This rule of binding authority upon the owners of steam-vessels. A steamer neglecting the rule condemned in the damage occasioned to a government steam-vessel in the river Thames.

This was also a cause of collision, promoted by her Majesty, in her office of Admiralty, against the same steam-vessel, for damage

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<sup>1</sup> [S. C. 1 Notes of Cases, 165.]

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The Duke of Sussex. 1 W. Rob.

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occasioned to her Majesty's steam-vessel *Lightning*, upon the 3d of January, 1838.

The act on petition set forth that *The Lightning* was proceeding up the river Thames for Woolwich, and had arrived in the Halfway Reach, about five miles from Woolwich, when *The Duke of Sussex* was seen coming down the river with the tide "end on" towards *The Lightning*; that when the two vessels had approached to within about a quarter of a mile of each other, it was obvious to the persons on board *The Lightning* that, if both vessels continued their respective courses, a collision would probably ensue. The helm of *The Lightning* was accordingly put to port, in conformity with a rule made by order of the Trinity House, on the 30th of October, 1840, and sanctioned by the Lords Commissioners of the Admiralty, for the navigation of government steam-vessels; that the helm of *The Duke of Sussex*, instead of being put in like manner to port, was put to starboard, and in a few seconds she ran her bowsprit into *The Lightning's* paddle-box, breaking the paddle-box and wheel by the collision.

The defence set up by the owners of *The Duke of Sussex* was, that the tide, at the time the collision occurred, was about one third ebb; that the full force of the ebb tide was northward of Halfway Reach, \* and that it was the practice and custom [ \*275 ] of steam-vessels coming up the river to keep to the south side of the mid-channel, and those going down to adhere to the north side; that *The Duke of Sussex* was pursuing the usual course, and if *The Lightning* had done the same the two vessels might have passed clear of each other; that there was no necessity for the persons on board that vessel to have ported her helm, and it was solely in consequence of *The Lightning's* deviation from the customary rule that the collision was occasioned.

*The Queen's Advocate* and *Phillimore*, for the crown.

*Addams* and *Curteis*, *contra*.

PER CURIAM.

It is expedient that I should address a few observations respecting the rule of navigation which has been discussed in the arguments of counsel in the present instance. The rule in question emanates from the Trinity House; and although it cannot be said to constitute a law *per se*, it is, nevertheless, a rule to be observed, and it is important that it should be distinctly understood, that in all future cases of this kind the court will consider this rule of binding authority upon

the owners of steam-vessels; and if the masters of such vessels shall think fit not to comply with it, in so doing they will be guilty of unseamanlike conduct, and their owners will be responsible for the consequences that may result from their disobedience of it. The rule itself is drawn up with great precision, and may be understood without difficulty. It is expressed in the following terms: "That

when steam-vessels on different courses must unavoidably [ \*276 ] and necessarily cross so near that, by \*continuing their respective courses, there would be a risk of coming into collision, each vessel shall put her helm to port so as always to pass on the larboard side of each other." The obvious meaning of the rule, therefore, is, that it is intended to apply whenever two steam-vessels are approaching each other in contrary directions, and there is a reasonable probability that by standing on a collision may ensue, — not, as has been argued, only where such collision is altogether inevitable. If, on the other hand, no reasonable apprehension of a collision is to be entertained and the observance of the rule would unnecessarily throw each vessel out of its course, it would be an absurdity to suppose that, under such circumstances, the rule was intended to apply. Such being the view which I entertain of the rule in question, I must now refer to the circumstances of the case, and consider the grounds upon which the defence to the present suit is rested. The grounds of defence are twofold; first, an alleged custom superseding the rule in question; and, secondly, that the circumstances of the case are such that the rule has no application in the present instance; in other words, that the two vessels were pursuing courses so widely distant from each other that there was no reasonable probability that a collision would have occurred. The custom that is alleged by the owners of The Duke of Sussex in their defence is this: that when the tide is running down the river and a steam-vessel is proceeding with the tide, the tide sets so strongly towards the north shore that it is the practice for such vessels to keep towards the Essex shore as much as possible, whilst a vessel coming up would adhere to the Kentish shore or south side of the river. This is said to be

[ \*277 ] an established \*practice or custom, but in point of fact it only amounts to this, that according to common sense the one vessel steers her course where the tide is strongest in her favor, the other where the adverse tide is weakest. But supposing the custom to exist as stated, it can only be acknowledged where there is an open way for each vessel to pass without any risk of a collision. In the present case it is directly averred on the part of The Lightning, that the two vessels were approaching each other "end on;" in which case I distinctly lay it down as my opinion, that the rule

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The Elizabeth and Jane. 1 W. Rob.

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was to be observed, and the custom, if any such custom exist at all, be superseded. If there be any risk, convenience must give way to the rule; if it were otherwise, the masters of steam-vessels would always be looking out for circumstances to justify them in departing from the rule; the rule would be disregarded for the sake of a little more or less convenience, and the greatest uncertainty would ensue in consequence. With these observations I must leave the first part of the defence with the gentlemen by whom the court is assisted, and it will be for you to determine (addressing the Trinity Masters) how far it was imperative upon the owners of The Duke of Sussex to have observed the rule in the present instance; upon the second part of the defence I must also rely upon your judgment to decide, whether the two vessels were so far distant from each other as to render it altogether unnecessary for The Lightning to have ported her helm under the circumstances of the case. If, under the facts disclosed in the evidence, there was a reasonable probability of collision, it is, I apprehend, clear that The Lightning acted properly, and that The Duke of Sussex is to blame.

*Trinity Masters.* The Lightning was thrown into the [\* 278] middle, of the river to avoid some colliers; and, under the circumstances of the case, we think, there was such a probability of a collision that The Lightning adopted the right course, and the accident was caused by the misconduct of The Duke of Sussex.

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THE ELIZABETH AND JANE, Miller.<sup>1</sup>

November 11, 1841.

The power of the Court of Admiralty to interpose for the purpose of altering the possession of a vessel, is confined to cases where the majority of interests is with the party invoking the court's interference.

Motion to change the possession at the petition of a moiety of the interest rejected.

IN this case an action was entered by the executors of John King, deceased, whilst living, the legal owner of thirty-two sixty-fourth parts or shares in the vessel, against the said vessel, her tackle, apparel, &c., in a cause of possession, civil and maritime.

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<sup>1</sup> [S. C. 1 Notes of Cases, 177; see also The Valiant, 1 W. Rob. 64.]

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The Elizabeth and Jane. 1 W. Rob.

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At the petition of the proctor for the executors, the usual decree was issued to arrest the vessel until bail should be given to answer the safe return thereof to the port of Portsmouth, to which she belonged. The decree was returned duly executed; and the fourth default having been granted, and no bail given, the court was now moved to decree a monition against Richard Tier, the owner of the remaining thirty-two shares, the party in possession of the said ship, to appear and show cause why possession thereof should not be decreed to the executors of J. K., with intimation that if he did not appear on the next court day after service of the same, or appearing, should not show cause to the contrary, the court would decree possession to the said executors.

The affidavit to lead the decree set forth, That the vessel [\* 279] was built at Emsworth, in the year one \*thousand eight hundred and thirty-four, for J. K., and R. T., the owner of the other thirty-two sixty-fourth shares or parts thereof; and under an agreement between the said J. K. and the said R. T. as joint owners of the said vessel, the said R. T. was placed in possession of the said vessel, and hath retained possession thereof for the last seven years, and down to the time of her arrest; and has hitherto refused, and still refuses, to give any account of her earnings. That the executors of J. K. being dissatisfied with the management and employment of the said vessel, and receiving no account of the earnings thereof, arrested the same for the purpose of obtaining sufficient security for her safe return to the port of Portsmouth, in the sum of 700*l*. That the vessel was so arrested at Emsworth, under the authority of the court, on the 3d day of June last, and that R. T. thereupon discharged the crew then on board the said vessel, and declared that he should not interfere further in regard to her employment. That since such time he hath allowed the said vessel to be high and dry at the ebbing of each tide, and the said vessel, being thereby unduly exposed to the action of the sun and wind, hath sustained and is still sustaining serious damage, and that the same is well known to the said R. T., he having been resident during such time at Emsworth aforesaid, and within view of the said vessel, and being consequently fully aware of her situation and condition.

On behalf of the executors *Bayford* submitted, That the present application had been rendered necessary by the conduct of [\* 280] the adverse party in \*possession of the vessel, which could not be anticipated, and which called loudly for the court's interposition upon the present occasion. That the object in requiring

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bail in the first instance was the preservation of the property in the vessel for the benefit of all parties interested. That such bail had been refused, and unless the conduct of Tier should now be controlled by the authority of the court, by decreeing possession as prayed to the executors, the vessel must inevitably perish, contrary to all principles of justice and the policy of the maritime law. That upon the general principles of that law the court had authority to decree possession as prayed, and in the practice of the court this authority had been already exercised upon a former occasion under similar circumstances; and in support of his argument he cited the case of *The Ægyptienne* (1 Haggard, 346); *Cleirac, Use et Coutumes de la Mere*; *Ordonnances de la Hanze Theutonique* (59, note); *Stracchia de Navibus*, Part 2, No. 6; *Godolphin's View of Admiralty Jurisdiction*; *Molloy*, lib. 2, c. 1; and *Abbot on Shipping*, Part 2, c. 3, s. 6.

## PER CURIAM.

DR. LUSHINGTON. The facts of this case, as disclosed in the affidavit to lead the decree, are shortly these: the vessel has been arrested under the process of the court in a cause of possession, until bail shall be given for her safe return to the port to which she belongs. Tier, a part-owner in a moiety of the ship, and the party in possession, refuses to give bail, or to interfere further in her employment. The crew have been discarded from on board since the arrest; and the vessel is now lying within sight of Tier's house, \* in a [ \* 281 ] situation in which she is becoming daily deteriorated. Under these circumstances an application is now made to the court to decree a monition calling upon Tier to show cause why possession of the ship should not be given to the parties in the suit in whom the remaining moiety of the interest in the vessel is vested; and the first point which I have to consider is, whether this court has any power to decree an attachment against the party in possession of the vessel, if he should refuse to comply with the monition of the court. Unless I have the authority to go the whole length in so enforcing the monition, it would, I conceive, be a dangerous experiment on the part of the court to make an order which it could not enforce. Now, in support of the application, a variety of authorities have been cited, and the case of *The Ægyptienne*, reported in 1 Haggard's Rep. has been referred to as decisive of the question. I have attentively considered these authorities, and have also examined the case reported, and I must say that the result of the examination leads me to a very different conclusion with respect to the court's jurisdiction in the present instance. Upon the authorities I am of opinion that the power of the court to inter-



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fere in cases of this kind for the purpose of altering the possession, is confined to cases where the majority of interests in the vessel is with the party invoking the interference of the court. Where, as in the present case, the possession is disputed by an equality of interests, the claims of the litigant parties must be decided by a reference to other tribunals. Looking to the practice of this court, I am not aware of any precedent in which, under the existing circumstances, [ \* 282 ] the jurisdiction of this court \* has been attempted to be enforced. Cases must have occurred in which similar applications must have been made, but with the exception of *The Ægyptienne*, no case is to be found in which the interference of the court has been interposed. In reference to the case of *The Ægyptienne*, it is to be observed that it is in no degree a case in point, inasmuch as it appears, from the report of that case, that although a monition was decreed, in point of fact it was never taken out, and the case ended there. It may therefore be inferred, that in that case a monition was subsequently withdrawn, upon reconsideration, by the order of the court. Under the circumstances of the case, then, I must come to the conclusion that I have no power to grant the application of the executors in the present instance ; and in forming this opinion I could not leave out of consideration the consequences that might ensue if I assumed the power to decree the possession of the vessel to be given up as prayed. If I, in the present instance, acceded to the application of a moiety of the interests in the ship, I could not refuse upon any subsequent application, to grant possession to the owners of interests less than a moiety. The same principle, as it appears, would equally apply in both cases. Another consequence would be, that in each case the court would have to consider the grounds upon which the particular motion in each case was founded, and to determine what course was most beneficial for the employment of the vessel.

I must therefore reject the present motion.

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The Duchess of Kent. 1 W. Rob.

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THE DUCHESS OF KENT, Newby.<sup>1</sup>

[\* 283]

November 11, 1841.

Claim for wages sustained.

No responsive plea given in on behalf of the owners.

Defence suggested by the owners upon interrogatories. 1st. Drunkenness; 2d. Absence without leave; 3d. Negligence of his duties as chief mate upon a particular occasion.

*Seem*, according to the practice of the court, alleged drunkenness of the mariner not available as a defence to the mariner's claim, unless it is specifically pleaded and put in issue in the cause.

Mere neglect of duty in a particular instance, unless followed up by consequences injurious to the owners, will not deprive a mate of his wages.

THIS was a suit for subtraction of wages promoted by H. Stokes, who served as chief mate on board this vessel, under the circumstances noticed in the judgment of the court.

For the mariner, *Queen's Advocate*.

For the owners, *Addams, contra*.

## JUDGMENT.

DR. LUSHINGTON. This is a suit brought by H. Stokes, who served on board this vessel in the capacity of chief mate, on a voyage from this country to Port Philip, thence to the East Indies, and back again to England. Whatever his conduct may have been during the period of time he continued on board the vessel, it is perfectly clear that it was not deemed necessary to dismiss him from the ship. He acted in the character of mate, and continued to perform the duties of that office on board during the outward and homeward voyage. Whether such duties were adequately and properly performed must be considered hereafter; *prima facie* he is undoubtedly entitled to his wages, unless facts are disclosed in the evidence, which, according to well known principles of law, will entail a forfeiture of those wages upon him. In order to ascertain the facts of the case, I must briefly refer to the summary petition, which is the only plea that has been given in the cause. The petition, after setting forth the voyage and the nature of the services performed, proceeds to the following effect:—  
“That during the outward voyage there were no locks or bulkheads,

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<sup>1</sup> [S. C. 1 Notes of Cases, 180.]

in consequence of which the crew had free access to the [ \*284 ] hold ; that on discharging the cargo, \* two cases, containing shoes and some rum, were discovered to have been purloined ; that the rum was subsequently found in the carpenter's chest, and it being apprehended that the master was about to take measures to ascertain the parties by whom the thefts had been committed, in order to bring them to justice, eight of the crew, including the second mate and the carpenter, absconded from the vessel, and that no intelligence was afterwards heard of them." This statement is obviously introduced into the summary petition with a view of forestalling the defence which it was probable that the owners would set up. In answer to this petition, no responsive allegation has been given in on behalf of the owners. It is said, however, that every witness who might have been called to prove the facts of the case has been examined, and cross-examined, and a variety of interrogatories have been addressed to these witnesses by the owners, proper to elucidate the truth as to the conduct of the mate in the performance of his duty, his behavior towards the master, and his habits of drunkenness : but these facts are not presented in any substantive form before the court, and the court could only collect the nature of the defence, upon which the owners intended to rely, from the interrogatories which have been so administered to the witnesses in the cause. I will not say that this course of proceeding on the part of the owners is not justified under the circumstances of this case, but I must observe, that the mode of the defence imposes considerable difficulty upon the court in the present instance. With respect to the alleged drunkenness of the mate, I doubt whether, according to the ordinary practice of [ \*285 ] the court, the court could pay \* any attention to a defence of that nature set up by the owners, unless it were specifically pleaded and put in issue in the cause. I do not think, however, that the present case will turn upon any such circumstance ; the issue in the cause is of a different description, and lies in a narrow compass, and to that I shall now address my attention. Now a person suing for wages in this court in the capacity of chief mate, is bound to show that he has discharged the duties of that situation with fidelity to his employers. Amongst the most important of these duties it is necessary that he should have exercised due vigilance, care, and attention to preserve the cargo from robbery. It could not be contended that he is to be responsible for every embezzlement or loss that might be incurred, otherwise a responsibility would be entailed upon persons filling that capacity which could not adequately be discharged. He is bound, however, to exercise due care, caution, and diligence ; and if, notwithstanding, a robbery should be committed,

without any neglect of duty on his part, in such case he would not be responsible. How far, then, does this principle apply to the circumstances of the present case? In this court, a mate may incur a forfeiture of his wages upon two grounds: first, a general neglect of duty, which *per se* would entail a forfeiture of the wages, and, secondly, a neglect of duty in a particular instance leading to a robbery of the cargo. Now, in this case, unless the embezzlement of the property be traceable to him, it is not alleged that the conduct of the individual promoting the suit was such as would fix upon him a charge of general neglect of duty entailing a forfeiture of his wages. Unless such general neglect were established, I do not think that occasional acts of intoxication would work such an effect. The [ \* 286 ] next consideration, then, is, whether he so neglected his duty towards the cargo in a particular instance, that he allowed the robbery in question to be committed. Upon this part of the case much discussion has been raised with respect to the state of the bulkheads, and it has been urged that the vessel was not furnished with the ordinary protection for the security of the property and preservation of the cargo on board. It is not, however, necessary for the court to enter into this discussion. As far as the evidence goes, if the case turned entirely upon this point, I should be inclined to hold that the mate was exonerated from the consequences of this embezzlement. But there is one circumstance to be noticed which has pressed upon me with great weight; I allude to the fact of the mate having gone on shore without the permission of the master, during the landing of the cargo, and having been absent for a long period of time. In so doing he was most undoubtedly guilty of a neglect of duty, and the cargo was exposed to the risk of being secreted, plundered, and carried away.

If it could be shown that the robbery in question was committed during the unauthorized absence of the mate from the vessel, I should have no hesitation in holding that the defence of the owners would be sufficiently established in the present instance. But I am not prepared to say that the mere circumstance of having exposed the cargo to an improper risk by his neglect, would, unless the embezzlement took place in consequence of that neglect, entail a forfeiture of the wages. I am not aware of any principle of law in which the doctrine has been laid down, that mere neglect of duty in a particular instance, \* unless followed up by consequences injurious to [ \* 287 ] the owners, would deprive a mate of his wages. Then the question is narrowed to the single point, whether the plunder which seems to have taken place on board this vessel, did actually occur during his absence on the particular night whilst the vessel was un-

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The *Alexander*. 1 W. Rob.

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loading her cargo at Port Philip. The *onus* of proving this fact clearly rests with the owners, and they are bound to establish this part of their case. I do not say that it is necessary for them to prove it by direct and positive testimony, but it should be proved by such evidence as would fairly lead to the presumption that, on the night in question, the robbery did actually occur during the absence of the chief mate from on board the vessel. Looking to the evidence upon this point, I find the account given by the witnesses is not in conformity with the plea. The petition states, "that upon discharging the cargo, it was discovered that two cases, containing shoes and some rum, had been purloined by the crew, and upon its being apprehended that the master was about to take measures to ascertain the parties by whom the theft had been committed, in order to bring them to justice, eight of the crew absconded." In the evidence of the witnesses it is sworn, that part of the crew absconded prior to the discovery of the robbery and part of them afterwards. I do not think then that this evidence can lead the court to any safe conclusion that the robbery took place on the particular night when the mate was absent; and being of that opinion I cannot with justice fix upon the mate the responsibility of the loss. I must therefore, without entering with further minuteness into the evidence, [ \*288 ] pronounce that the defence set up by the owners of \*this vessel has failed, and consequently that the wages are due.

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THE *ALEXANDER*, Larsen.<sup>1</sup>

November 24, 1841.

Construction of the act 3 & 4 Vict. c. 65, s. 6, as to the power of the court to entertain a suit under the provisions of the act, for necessities furnished to a foreign vessel in 1835, prior to the passing of the statute.

Protest against the jurisdiction of the court overruled.

In this case an action was entered against *The Alexander*, a Norwegian ship, upon the 22d of July, 1840, under the stat. 3 & 4 Vict., c. 65, s. 6,<sup>2</sup> for the recovery of the sum of 46*l.* 13*s.*, the price of an

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<sup>1</sup> [S. C. 1 Notes of Cases, 185. Reported also 1 W. Rob. 346.]

<sup>2</sup> "And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services ren-

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The *Alexander*. 1 W. Rob.

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anchor and cable furnished to the vessel by Mitchelson & Co., of London, in the month of July, 1835.

An appearance was given for the owners under protest, and the jurisdiction of the court to entertain the suit was denied upon the ground that the cause of action originated prior to the passing of the statute, and that the act in question was prospective and was not intended to have a retrospective operation.

In support of the protest, *Jenner*, for the owners, submitted :

That the rule of law for construing acts of parliament, in relation to the time of their coming into operation, had been correctly laid down by Lord Coke, in his second Institute, p. 292, in the following words, "*nova constitutio futuris formam imponere [ \* 289 ] debet non præteritis*;" and the same principle was also to be found in Blackstone to the following effect: "There is still a more unreasonable method than this, which is called making laws *ex post facto*, when, after an action (indifferent in itself) has been committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law;" and the learned commentator then goes on to say, "all laws should be therefore made to commence *in futuro*, and be notified before their commencement." That the application of a different principle in the present instance would be attended with manifest hardship and injustice, not only to the immediate parties in the suit, but to a large class of interests that might be seriously affected and prejudiced if the construction which the material men now endeavored to put upon the 6th section of the act should be adopted by the court.

In the case of mortgagees and purchasers *bonâ fide* advancing money upon a vessel without notice of lien, subsequent to the time when necessities may have been furnished, but antecedent to the passing of the statute in question, what would be the consequence? Prior to the passing of the act, material men not in actual possession had no lien whatever upon the ship, and could not proceed against her *in specie*. Is the *bonâ fide* mortgagee or purchaser, then, who has

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dered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or damage received, or necessities furnished, in respect of which such claim is made."

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The Alexander. I W. Rob.

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advanced his money upon the security of the vessel in reliance upon the ancient law, to be turned round upon by the new act, and saddled with claims upon the vessel, which, as far as he is [ \* 290 ] \* concerned, are entirely new claims, and had no legal existence at the time when the mortgage or the purchase was made ?

PER CURIAM.

You are assuming a difficulty which does not exist in the present case. This is a foreign ship, and the act in question was framed with the express intention of remedying the inconvenience to which persons in the situation of the claimant in the suit were subjected before the act passed, in being compelled to prosecute their claims against the owners in foreign courts. If you can show me that in entertaining this suit I am about to postpone a judgment creditor of the owner, you would establish a clear case of injustice ; and if there was any prior equitable claim outstanding against the vessel in this case, I should be bound to notice it. The jurisdiction of the court is an equitable as well as a legal jurisdiction, and when the legislature confers upon the court a jurisdiction to entertain suits of this description under the operation of the recent statute, it is to be presumed that the court will exercise that jurisdiction in equity and upon equitable principles.

Jenner, in continuation. The mortgagee or purchaser might still be unjustly prejudiced by the mere arrest of the vessel, and her possible detention in this country, whilst the claim of the material man was under litigation. Until the question was judicially brought under consideration, the court could not know *a priori* whether or not there were any preferable equitable claims outstanding [ \* 291 ] against the vessel which must \* supersede the claim of the material man. Upon application being made to the court for its assistance, the warrant of the court would be extracted and the vessel would be arrested ; and if, as it might happen, the mortgagee or purchasers were foreigners, and had no agent or correspondent in this country to give the bail required, the vessel must be detained until the whole merits of the case had been legally decided by the judgment of the court. Under these circumstances he submitted that a hardship and injustice would ensue if the construction now attempted to be put upon the 6th section of the act should be upheld. The rule laid down by Lord Coke and acknowledged by Mr. J. Blackstone was a sound and a just rule, and it had been recognized in the practice of the common law in the following cases :

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*Gilmore v. Shuter*, Jones, 108; 6 Bingham, 258; *Wilkinson v. Mayer*, Lord Raymond, 1122; *Towler v. Chatterton*, 6 Bingham; *Poole v. Neeld*, 2 Sid.; *Freeman v. Moyes*, 3 Nev. & Man.; *Paddon v. Bartlett*, 5 Nev. & Man. 388.

For the material men, *Addams, contra*. That the words of the 6th section of the statute 3 & 4 Vict. c. 65, were unambiguous upon the face of them, and that the intention and purport of the legislature in framing the act was clear and obvious. The words of the 6th section were: "The court shall have jurisdiction to decide all claims and demands whatsoever for necessities supplied to any foreign ship." Under these terms he did not mean to contend that the act was intended to have a retrospective effect upon the direct issue in the cause, but \* that it should [ \* 292 ] have a retrospective operation as regarding the authority of the court to take cognizance of the subject-matter. Under the former state of the law, before the statute passed, material men who had parted with the possession of a vessel, had no means of recovering their demand for necessities supplied to the vessel but by a process of common law against the master or the owners if they could be found in this country, or by proceeding against them in a foreign court. It was for the purpose of remedying this inconvenience, and affording greater facility and protection to the British creditors, that the statute in question was enacted. It was, therefore, strictly speaking, a remedial statute, and as such was to be construed liberally. That the assumed hardship which might fall upon third parties, upon which so much stress has been laid in the argument in support of the protest, could not possibly occur in the present case, inasmuch as the vessel against which the suit was brought was still the property of the same owners upon whose account the necessities now sued for were furnished, as far back as the year 1835.

As regarded the assumed injustice to the immediate parties in the suit, if any consideration upon that point was to influence the decision of the question, the balance strongly preponderated in favor of the material men, who had already suffered injury and injustice from the owners of the vessel in having been kept so long out of their money; and it would be still a further aggravation of that injustice and injury if the attempt of the owners, to deprive them of the right to have their claims at length adjudicated in the court, should succeed.

\* JUDGMENT.

[ \* 293 ]

DR. LUSHINGTON. The action in this case is brought



under the provisions of an act of parliament passed in the third and fourth years of her present Majesty, and the object of the suit is the recovery of a debt alleged to be due for necessities furnished to the ship, which is a foreign ship, in the year 1835. The vessel has been arrested, and the owners, who are represented to have been the owners when the debt was incurred, appear under protest alleging that the sixth section of the act in question is altogether prospective, not only as to the origin of the debt itself, but also as to the remedy for recovering that debt by a proceeding in this court. It may be doubtful whether an appearance under protest, which is in the nature of a plea in bar, is the proper form of raising an objection to the jurisdiction of the court; but as the case may be conveniently disposed of in its present shape, I do not think it necessary to enter into a consideration of this point upon the present occasion. I wish, however, that this intimation of the court's opinion may be distinctly known, and observed in future by the practitioners of the court.

Now, the action in the cause is brought in virtue of the particular statute recently enacted, and without that statute the court would not have been justified in entertaining the suit at all; for although the subject-matter of the case clearly falls within the original scope of the maritime law, before the passing of the statute, the court might have been prohibited from proceeding in the cause upon the ground that the common law had narrowed the general jurisdiction originally belonging to this court. Such prohibition is now

[ \* 294 ] taken off by the statute, but \* looking to the words of the act

I do not find any expressions limiting the jurisdiction of the court to cases occurring subsequent to the period when the act came into operation. It has, indeed, been contended in argument, that the court in taking cognizance of claims originating prior to the passing of the act, might possibly do injustice: that the interests of third parties might be injuriously affected. But I think that this view of the case is not well founded, and for these reasons:—in the first place the statute does not create a lien upon the vessel at all; the debt has no foundation upon the statute. The effect of the statute is expressly declared in the sixth section in these terms: “That the Court of Admiralty shall have jurisdiction to decide all claims and demands whatever for necessities supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof.” The statute, therefore, simply confers upon the court a jurisdiction to be employed in every lawful mode which the court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred. Secondly, the court having this jurisdiction conceded to

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The *Alexander*. 1 W. Rob.

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it, would be bound to exercise that jurisdiction equitably; and in so doing it would protect the interests of all persons having a *bonâ fide* lien upon the property; as, for instance, subsequent purchasers without notice.

And here I must remark, in reference to this particular case, that no subsequent lien has been established as outstanding upon this vessel, and I wish to draw especial attention to this fact, that it may not be hereafter supposed, that, in pronouncing for my jurisdiction, or exercising it upon the present \*occasion, I [ \*295 ] have held, that a claim of this description contracted by a ship four or five years antecedent to the passing of the statute, militated against subsequently acquired interests;—I give no opinion upon this point, it may be a question hereafter, which I have not now to determine, whether a ship having *bonâ fide* passed into other hands, would be liable to any such demands at all. With respect to the general argument that has been addressed to the court, I am not aware of any principle or decision which establishes the doctrine, that where a statute affords a new mode of suing, the cause of action must necessarily arise subsequently to the period when the statute comes into operation. On the contrary, where a statute creates a new jurisdiction, the new jurisdiction, I apprehend, takes up all past cases, and there is not the slightest injustice in this; for, although the circumstances may have occurred prior to the passing of the statute, the suit or action may have been commenced subsequently. If in any particular case an injustice might be committed by the exercise of the new jurisdiction, it would be the undoubted duty of the court to consider whether the new jurisdiction should be applied to such particular case; for instance, whether or not, in a case of this description, such circumstance might not operate to prevent a creditor from recovering against the ship.

In the present case, in which, by the general maritime law of Europe, the ship would be liable for the necessities supplied, no intermediate rights, as far as it appears, are in conflict. The ship belongs to the same foreign owners who were in possession at the time when the debt was contracted; and there exists the same reason for the remedy as induced \*the passing of [ \*296 ] the statute in question, namely, the difficulty of suing such foreign owners who are resident abroad. It is, moreover, to be borne in mind that the statute is a remedial statute, and, as such, should be construed with sufficient liberality to meet the mischiefs which it was intended to remedy; and this is clearly one of the mischiefs contemplated when the statute was enacted. I have referred to the authorities which have been cited in support of the protest,

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The Neptune. 1 W. Rob.

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but I do not find that any of them affect the merits of this case; the great majority of them depend upon the peculiar wording of the statute under consideration at the time the cases were decided; and it is obvious that the slightest alteration of the wording of a statute would make it retrospective or prospective only. Again; some of the cases refer not to actions brought subsequently, but to actions already commenced at the time when the statute was passed; as, for instance, the case of *Freeman v. Moyes*. In that case, the executors had commenced their action prior to the passing of the statute 3 & 4 Will. IV., which first made executors liable to the costs. The court held, that the new statute did apply to entail the liability for the costs upon the executors. These cases, then, are totally different from giving a remedy in cases existing prior to the statute, and in which no proceedings had been commenced when the statute came into operation. I have looked at the text authorities, and although some expressions may be found in some of the ancient writers, with regard to remedial statutes, that they should not contravene the common law, all the commentators agree in this, that remedial statutes should have a liberal construction. The words of this [ \* 297 ] statute give me jurisdiction, \* and I am bound to exercise it upon the present occasion. If, in the exercise of this jurisdiction, facts should be disclosed to the court showing that other persons have equitable claims upon this vessel, and that such claims will be prejudiced by the demand which is now set up by the material men in this case, I must administer the law in equity, and decide between them. I therefore overrule this protest, and assign the parties to appear absolutely; and the question of costs I reserve for future consideration.

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### THE NEPTUNE, Friecker.

January 19, 1842.

Consolidated action by two sets of salvors, consisting of the crews of seven smacks, for salvage rendered to a foreign ship in getting her off the Long Sand.

Action dismissed, upon the ground that the primary salvors, who had boarded the vessel prior to her striking upon the sand, had acted erroneously, and the measures which they adopted had, in point of fact, caused the vessel to get upon the sand.<sup>1</sup>

An application subsequently made to the court on behalf of the second salvors, who had come up and rendered assistance after the vessel was upon the sand.

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<sup>1</sup> [As to forfeiture of salvage by misconduct, see *The Duke of Manchester*, 2 W. Rob. 470; *The Joseph Harvey*, 1 C. Rob. 306, note.]

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The Neptune. 1 W. Rob.

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Application sustained, no recognition being made by the second salvors of the acts done on board the vessel, previous to the commencement of their services; 200*l.* awarded to second salvors.

IN this case an action was entered against this vessel, by the owners, the masters, and crews of *The Atalanta* and six other fishing smacks, in a cause of salvage, civil and maritime.

The act on petition for the salvors alleged — That at nine, A. M., upon the 14th of September, *The Atalanta* being outside the Shipwash Sand, in the North Sea, the wind being a fresh breeze from the E. S. E. and the weather hazy, perceived a bark with a flag at the foretopmast, running in about west between the Kentish Knock and the Long Sand; that a signal was made from the smack for the bark to shorten sail and heave to, but such signal the bark did not attend to, but kept her course until she was within a quarter of a mile from the Long Sand; that, upon *The Atalanta* coming up with her, the head of the bark was wore round from the west to N. E., whereupon four of the crew of *The Atalanta* manned their boat, and hailed the bark to let go the anchor as quick as possible, but that such hailing was not attended to; that S. I., one of the smacksmen, then \* boarded the bark, and immediately went forward, [ \*298 ] and, with his assistance and under his direction, the larboard bower anchor was let go; that, after the anchor had been so let go, the chain cable broke, and the starboard bower anchor was then let go, with about sixty fathoms of chain, but the sea and tide being strong, it did not check the bark; whereupon the anchor was slipped, but, before the canvas could be properly set to get the vessel into the swatchway, she struck upon the Long Sand, where she laid fast, upon the ebbing of the tide. The act on petition also further alleged, that assistance was immediately obtained from the crews of the six smacks, the other parties in the suit; and that, after being employed for two days in throwing overboard one third of the cargo, consisting of wheat, the salvors succeeded, by their combined exertions, in getting the vessel off the sand upon the evening of the 16th, and upon the 17th she was safely moored in Harwich harbor.

The defence set up by the owners of *The Neptune* was — “ That the flag at the foretopmast was a signal for a pilot; that the crew of *The Atalanta*, on nearing the bark, represented themselves as pilots, and that S. I., and others of the said smacksmen, were received on board the bark in that character and capacity; that the said bark was driven on the sand in question by the improper and injudicious conduct of the said S. I. and his parties, upon their coming on board and taking the command of the bark, and that if she had been put in stays in the first instance, as the master himself desired, she could,

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The Neptune. 1 W. Rob.

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and in fact would have gone clear of the sand; that the letting go the anchor whilst the bark was under weigh with all her canvas [ \* 299 ] set, was attended with great \* risk, either that she would have broken her windlass by the shock in bringing up, or that she would have been dismasted, and so rendered unmanageable, or, as actually happened, that she would have broken her chain cable." The defence also pleaded various contradictions of the statement set up by the salvors in the act on petition.

The admitted value of the ship and cargo was 7,530*l.* 9*s.* 6*d.*, and bail was given by the owners in the sum of 1,900*l.*

The case was argued before Trinity Masters by

*Haggard and Harding*, for the salvors.

*Addams and Robinson*, *contra*.

The court having fully adverted to the facts of the case, in addressing the Trinity Masters observed to the following effect: — " Having now gone through the facts of this case, I must leave it to you, gentlemen, to decide as to the propriety of the measures which were adopted by the salvors upon the present occasion. In bringing those measures to your notice, I have confined myself to the statement which has been set up by the salvors themselves, without entering into any disquisition whether what has been sworn by them is contradicted or not. Upon the statement so made, the court is now desirous of obtaining your opinion upon the two following points: first, was the measure of dropping the anchor, as advised and executed by the salvors, a proper measure to be adopted under the circumstances of the case? and, secondly, looking to the state of the wind and weather, the position of the vessel and the condition she was in, might not other measures have been pursued by seafaring men of ordinary skill, in the condition of the salvors, which [ \* 300 ] would have led to \* her perfect safety? It has been truly said by the counsel for the salvors, that the court is not to expect from salvors, assuming the management of vessels in cases of this kind, the same skill as would be required from regularly licensed Trinity pilots; at the same time, it is equally true that, in order to entitle them to a salvage award in this court, they must show that they possessed skill commensurate with their vocation and condition in life, and adequate to the duties which they undertook to perform."

*Trinity Masters.* We are of opinion that the crew of The Ata-

lanta, upon going on board The Neptune, acted wrong in advising the anchor to be let go; they should have tacked the ship, and kept her course to the south, when she would have gone to the south of the Kentish Knock; the vessel was under perfect command, and there was a fine breeze at E. S. E.

The court then pronounced against the claim of the salvors, and dismissed the owners of The Neptune from the suit.

An application was afterwards made, during the sitting of the court, that a salvage remuneration might be awarded to the crews of the six fishing smacks, who had rendered their assistance after The Neptune was upon the sand; and on their behalf it was submitted, that they were in no degree implicated in the original misconduct of The Atalanta. This application was opposed by the counsel for The Neptune, upon the ground that the parties had embarked in a common action with The Atalanta in this case, and, consequently, they were equally concluded with the crew of that vessel by the judgment which had already been pronounced by the court.

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\* *PER CURIAM*. This part of the case is not without its [\* 301] difficulty. The first impression upon my mind after hearing the opinion of the Trinity Masters strongly inclined against the parties in whose behalf the present application has been made. As regards The Atalanta, it has been most clearly established in the present instance, that the measures adopted by her crew were grossly erroneous, and in point of fact gave rise to the calamitous circumstances which subsequently ensued. If therefore I was satisfied that the parties now claiming as joint salvors had any connection with The Atalanta and those on board her, I should hold them decidedly included in the judgment which has been already pronounced. If their claim was founded in any degree upon the original error of that vessel, no service which they may have rendered afterwards, however meritoriously performed, would entitle them to derive a benefit from the error and misconduct of The Atalanta.

What then is the evidence before the court upon this part of the case? Now in looking to the pleadings and the affidavits in the cause, the facts of the case warrant me in stating that no one of the smacks was in company with The Atalanta when she first descried The Neptune, nor indeed until some considerable time afterwards, when The Neptune had got upon the sand. This is quite clear from the evidence before the court. If, therefore, the owners and crews had thought fit to proceed in the first instance by a separate and

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The Sociedade Feliz. 1 W. Rob.

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distinct action, they could not have been at all affected by the misconduct of The Atalanta. The question then arises whether they have placed themselves in a less favorable position in having [ \* 302 ] adopted The Atalanta's proceedings in this \* cause. Upon this point I must observe, that they can only be said so far to have adopted the proceedings of The Atalanta that they have adhered to the case originally set up by that vessel, and have made affidavits in its support. In what they did as salvors on board The Neptune, they do not appear to have recognized in any degree the acts previously done on board that ship by the crew of The Atalanta. I cannot, therefore, without injustice impute to them any participation in the culpability attaching to The Atalanta, and if I were to hold them excluded from any reward for their services upon the simple ground that they had joined with The Atalanta in the institution of these proceedings, I should be establishing a precedent in future cases of this kind, which would be attended with great inconvenience to the practice of the court, and the interest of suitors. It is most desirable that the proceedings in these causes should be conducted with the least possible delay and expense. This object, it is manifest, would be entirely defeated, if, in future cases of a similar kind, where different sets of salvors are concerned in the same service, separate actions should be brought, and separate appearances given. Upon the whole, then, I must come to the conclusion, that these parties are entitled to some remuneration in the present instance, but that remuneration must be modified under the circumstances of this case. The value of the vessel and cargo is admitted to amount to the sum of 7,530*l.*, and I think that I shall do justice in allotting them 200*l.* with their costs, but I shall allow no costs to The Atalanta.

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[ \* 303 ] \* THE SOCIEDADE FELIZ, Joao de Souza. Campos.<sup>1</sup>

January 21, 1842.

In cases of joint capture of slave vessels, the claim of the joint captors must, subject to the exceptions which peculiar circumstances may suggest, be governed by the principles adopted with respect to cases of joint capture in the Prize Court of Admiralty. Log of the vessel claimining as joint captor not admissible as evidence.

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<sup>1</sup> [S. C. 1 Notes of Cases, 286. Also reported on a subsequent hearing, 2 W. Rob. 155; 2 Notes of Cases, 430.]

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The Sociedade Feliz. 1 W. Rob.

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In order to sustain the claim of the vessel asserting an interest in the joint capture, it must be pleaded,

1st. That there was an association and coöperation with the capturing vessel.

2d. That the vessel claiming was seen by the captured slaver at the time the capture was effected.

An allegation defective in these particulars directed to be reformed.

THIS was a question as to the admissibility of an allegation propounding the interest of the commander, officers, and crew of H. M. brigantine Forester, to share in certain proceeds and bounties arising from the seizure of the above vessel.

The first article of the allegation pleaded, "That in the month of November, 1839, H. M. sloop of war Harlequin, and H. M. brigantine Forester, were cruising on the coast of Africa, under orders from the Lords Commissioners of the Admiralty for the suppression of the slave trade, and specially furnished with the documents and instructions for that purpose required by the convention between his late Majesty George IV. and the Emperor of the Brazils for the final abolition of the African slave trade, so far as relates to the dominions and subjects of the Brazilian empire."

The second article pleaded, "That upon the 21st of said month of November, whilst H. M. said ships Harlequin and Forester were lying together off Cape Palmas, a strange sail was reported seaward about fifteen miles distant; whereupon The Harlequin (being senior in command) immediately got under weigh and gave chase, having first by signals ordered The Forester to remain at anchor until her return, and pick up her boats, two of which were left behind, and which orders The Forester obeyed, as she was bound to do, in both particulars; that the said strange sail or vessel, on seeing The Harlequin, give chase, stood towards her, and hoisted Brazilian colors, and when within about seven miles from where the chase commenced, and The Forester was \* lying at anchor, [ \* 304 ] was brought to and captured by The Harlequin in full sight of The Forester, and within easy reach of her coöperation and assistance," &c.

The third article pleaded, 'The entry of the transaction made on the same day in the log-book of The Forester by F. H. the second master of the said vessel, and it also set forth the minutes of the said entry.

The fourth pleaded, The condemnation of the captured slaver.

The fifth, "That The Forester was at the time of such capture well victualled and watered and in a perfectly efficient state; and was ready to have joined in chase, and would have so done if she had not been prevented by the orders as aforesaid signalled from The Harlequin," &c.



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The sixth, "That the moiety of the net proceeds of the said capture, and the bounties granted by act of parliament on the tonnage of the said vessel, amounting to the sum of 958*l*., were in the hands of the navy agents of The Harlequin, who had been duly warned not to proceed to distribute the same," &c.

The admission of this allegation was opposed on behalf of the officers and crew of The Harlequin by

*Queen's Advocate* and *Bayford*, who submitted — That the claim of The Forester to participate in the bounties was to be considered upon the same footing as a claim for head-money, and under the act of parliament 5th Geo. IV. c. 113, s. 68, such claim was exclusively confined to the actual captors. With respect to the moiety of the proceeds of the ship and of the goods on board the captured vessel at the time of the capture, the claim of the asserted joint cap-  
[ \* 305 ] tors was determinable by the \* general principles laid down and adopted with respect to cases of joint capture in the Prize Court of Admiralty. That according to the principles so laid down, the presumption of law was in favor of the actual captors, and the *onus probandi* lay with the party setting up a claim of joint capture; that the facts set forth in the allegation were *insufficient* to establish that association and high coöperation on the part of The Forester which would entitle the officers and crew of that vessel to share in such proceeds under the authority of the cases. The *Aviso*, 2 Haggard, p. 31; The *Vhreid*, 2 Robinson, p. 16; *Financier*, 1 Dodson, p. 61. Lastly, that the entry in the log-book was inadmissible as evidence in the cause, under the authority of the cases *Le Niemen*, 1 Dodson, p. 9; note to the case of *Zephyrina*, 2 Haggard, p. 318.

*Addams* and *Robertson*, *contra*. That the association of the two vessels was sufficiently to be inferred from the fact set forth in the first article, that they were both cruising under the orders of the admiralty for a common purpose, namely, the suppression of the slave trade on the coast of Africa, and were both furnished with the necessary documents and instructions for that purpose required by the convention between his late Majesty George IV. and the Emperor of the Brazils; that the capture was effected within sight of The Forester, and although that vessel was lying at anchor at the time, she was so lying at anchor only in obedience to the orders of the commander of The Harlequin; that she was perfectly prepared to coöperate, and would have coöperated with The Harlequin, had any neces-  
[ \* 306 ] sity arisen for such coöperation, \* and that under these circumstances she was sufficiently within the principles laid

down in the Prize Court with respect to cases of joint capture to entitle the officers and crew on board to participate in the benefits of the capture in question; that the cases cited were not in point with the present case, but there was a case reported precisely in point, upon which the admissibility of *The Forester's* title might safely be rested, namely, the case of *The Galen*, reported in 2 *Dodson*, p. 19; that the entry in the log-book was not pleaded as a mere exhibit in the cause, but was stated to have been made by a person on board *The Forester*, who would be examined as a witness, and might be cross-examined on the other side; and that the case of *The Niemen*, in which an objection to the admission of the log-book of *The Amethyst* as evidence in the cause was sustained by the court, was widely distinguishable from the present case, the entry in such log-book being pleaded for the purpose of upholding the interest of a third party, who was not directly entitled to share in the capture which formed the subject of discussion in that case.

## JUDGMENT.

DR. LUSHINGTON. The question in this case is raised upon the admissibility of an allegation setting forth the claim of the commander and crew of H. M. ship *Forester*, to share in the proceeds and bounty moneys arising from the capture and condemnation of this vessel.

In the case of *The Aviso*, reported in 2 *Hagg.* p. 31, it has been laid down by Lord Stowell that claims of this description must, in all ordinary cases, subject to the exceptions which peculiar circumstances may suggest, be governed by the same rules which have for a long period of time been applied to cases of [\*307] joint capture in the time of war. To the principle so laid down, I give my cordial assent, and as far as the principle itself extends, I shall willingly take the case of *The Aviso* as the guide for my judgment in the present instance. But the authority of the decision in *The Aviso* goes no further. The circumstances pleaded in that case are very different from the facts set forth in the allegation which is now offered to the court; and although I entertain a latent suspicion that the two cases more nearly resemble each other than in this allegation they purport to do, it is my duty to determine its admissibility, with reference only to the facts which form the statement of the case before me; the court cannot assume any additional circumstances. Now all the circumstances upon which I can form my judgment in the present instance are to be found in the second article of the allegation; it states as follows:—"That upon the 21st of November, whilst her Majesty's ships *Harlequin* and *Forester* were

lying together off Cape Palmas, a strange sail was reported seaward, about fifteen miles distant; whereupon The Harlequin, being the senior in command, immediately got under way and gave chase, having first, by signals, ordered The Forester to remain at anchor until she returned, and to pick up her boats." Here I must observe that the court is left entirely uninstructed as to the relative bearing of the two vessels, the one towards the other; whether or not there was any connection between them, beyond that of two vessels engaged in executing orders received by them in the same part of the ocean.

In the case of two king's ships so meeting each other, it [ \*308 ] would, \* I apprehend, be a matter of ordinary course, that the superior vessel should assume the command, unless the inferior officer was under distinct admiralty orders.

If, then, any connection, beyond that to which I have just adverted, existed between The Harlequin and The Forester upon the present occasion, it should have been set forth in the allegation now under consideration. The omission of all information whatever upon this point is an important omission, and materially distinguishes the present case from that of The Aviso, in which it was expressly pleaded that the vessel claiming as joint captor was, in pursuance of commands issued by competent authority, acting in obedience to the orders of the actual captor. The second article of the allegation then goes on to state, " That the said strange vessel, on seeing The Harlequin give chase, stood towards her, and hoisted Brazilian colors; and when within about seven miles from where the chase commenced, and The Forester was lying at anchor, was brought to and captured by The Harlequin, in full sight of The Forester, and within easy reach of her coöperation and assistance." What, then, are the facts of the present case, as they are thus disclosed in the second article of this allegation? The two vessels, it appears, were both engaged in a common pursuit, but The Harlequin had no right to exercise a command over The Forester, other than that which arose from the accidental circumstance of the two vessels meeting each other, and The Harlequin being the senior in command. It also further appears that The Forester, in obedience to orders, remained at anchor; that The Harlequin proceeded in chase, and the capture was effected within sight of The Forester. Here, again, it must

[ \*309 ] \* be noticed, as an important omission in the case, that no averment is made that the prize ever saw The Forester. In a case of prize capture, it would not be sufficient merely to aver that the capture was effected within sight of the joint chaser, and for this reason, that the claim of joint capture is founded upon the principle of implied intimidation, and it is obvious that there can be no such

thing as intimidation effected by a joint chaser, unless the prize describes her; the mere fact of the prize being seen by the joint chaser at the time of the capture, would work no effect whatever upon the capture.

How then does this principle apply to the present case? It is directly alleged that *The Forester* was in the service of *The Harlequin* at the time, being employed to pick up her boats; it is to be inferred, therefore, that there was an inclination to capture on the part of the officers and crew of *The Forester*, and if that vessel had been seen by the prize, the principle of intimidation would undoubtedly apply under the doctrine laid down by Lord Stowell, that a Brazilian vessel employed in the slave trade is to be considered in the light of an enemy. It may often happen in cases of this kind, that a great disparity of force may exist between the two vessels, and that the British captor may possess such a superiority of power, that no resistance can be offered by the slaver; at the same time circumstances may not unfrequently occur, in which the assistance of a second vessel may be so far necessary, that without her coöperation the capture could never be effected. For instance, in the case of a calm, it might be impossible to follow the chase with any chance of overtaking her; in such a case, \*the boats of a second vessel [ \*310 ] being sent out, would essentially conduce to the capture.

Looking to the reported cases of joint capture, the general principle is, that king's ships being in sight are entitled to share as joint captors, especially when the *animus capiendi* is distinctly proved, or may fairly be presumed to have existed. In this case, the defective form of the plea places the court in some difficulty; but if the being in sight had been pleaded, in the proper acceptation of the term, and it had been averred that the captured vessel saw *The Forester*, the *animus capiendi* might safely be inferred under the circumstances of the case, and the court might presume that *The Forester* would have joined in the chase, unless prevented by the order of the superior vessel in command. None of the exceptions, which are to be noticed in the reported cases, would then have applied to the circumstances of the case. In the case of *The Financier*, reported in the 1 Dodson, p. 61, Lord Stowell, it is true, observed, "that the first duty of king's officers is to obey the lawful commands of their superiors, and that views of mere private advantage are of secondary consideration only, and must give way to the imperative requisitions of the public service." But the case of *The Financier* is altogether different from the present case. In the case of *The Financier*, her Majesty's ship *Britomart*, claiming as a joint captor, was entirely out of sight when the capture was made by *The Desirée*.

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The Sociedade Feliz. 1 W. Rob.

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If it was necessary to enforce the principles of any particular decision, the case of *The [Malanie]*<sup>1</sup> would more immediately apply to support the view which I have taken upon the present occasion. [\*311] \*All the cases are there stated, and the decision of Lord Stowell in that case shows that the principles which influenced that distinguished judge in the commencement of his judicial career, continued to govern his judgment down to the conclusion of it. Under the circumstances of the case, then, I think that I am bound, in justice to the parties in the present case, to direct this allegation to be referred back, in order to give them an opportunity of reforming it. When reformed, looking to the facts and circumstances as they have generally occurred upon the coast of Africa, the case may, I think, be brought within the principles of *The Aviso*.

With respect to the entry in the log-book, pleaded in the third article of the allegation, I am clearly of opinion that the log-book of a party suing can never be made evidence in his favor, under any shape, and this upon principle, without reference to the authority of decided cases. It has, indeed, been attempted to be argued, that the particular averment of the plea raises a distinction in the present case, but I cannot admit that any such difference exists, as would justify a departure from the ordinary practice of the court. In the case of *The Niemen*, which has been cited in the argument by the counsel for *The Harlequin*, the general principle was even more strongly applied than would occur in the present instance. In that case *The Amethyst* and *The Arethusa* were the two captors, the battle being fought by the former, but the actual capture being effected by the latter vessel; with respect to the title of these two ships to share as joint captors, no question was raised. Before the capture was effected, however, an agreement had been made [\*312] between a third vessel, *The Emerald*, and *The Amethyst*, to share in all prizes taken by either vessel reciprocally, and a claim was set up by *The Emerald*, as a joint chaser, and the log-book of *The Amethyst* was pleaded in support of such claim. An objection was taken by counsel to the admission of such log-book, as evidence in the cause, and the court held that it was inadmissible, since it went to give a common interest to the parties. In the present case the objection, it appears to me, is even much stronger, and I feel that I should be departing from the general principles of evidence, in admitting the log-book of *The Forester* as evidence in this case. I must, therefore, reject the third article altogether.

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<sup>1</sup> 2 Dodson, p. 123.

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The Lord Cochrane. 1 W. Rob.

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Before dismissing the case, I would offer a suggestion, as a guide to the parties in the cause. It is not improbable, I conceive, that such orders may have been issued by the admiralty, as would have made it incumbent upon *The Forester* to place herself under the immediate orders of any superior officer upon the same station, and in the same occupation in which she was employed; if it should be so, it is essential that these orders should be directly pleaded. It may also be the fact in this case, that *The Forester* was seen from the prize at the time of the capture; this circumstance would be most material, and should be inserted in the pleadings.

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THE LORD COCHRANE, Smith.<sup>1</sup>

January 22, 1842.

**Bond of bottomry granted against ship, freight, and cargo.**

In the action against the ship and freight, judgment allowed to go by default, but the suit, as against the cargo, contested by the consignees.

Application by the bondholder to have the amount of the freight and the proceeds of the ship, paid out of the registry, in part liquidation of the bond.

Application resisted by the consignees of the cargo, upon the ground that if the bond as against the cargo, should be invalid, the consignees would be entitled to be indemnified for the costs out of the proceeds of the freight.

Opposition of the consignees not sustained.

*Semble*, under ordinary circumstances, freight would be paid out to the bondholders as a matter of course, and the court would only be induced to hold its hand under circumstances of a strong and special character, as, for instance, that the party suing upon the bond was resident abroad, and there was no possibility of compelling him to pay the costs of the suit, in case he should be condemned in them.

THIS was a cause of bottomry, promoted by Messrs. McCalmont & Co., of Pernambuco, against the ship, and also against her freight and cargo, for repairs done to the vessel at Pernambuco, in the year 1839.

\* The sum alleged to be due upon the bond was 8,558*l.* [ \* 313 ] 12*s.* 4*d.* Upon the arrival of the vessel at Liverpool, on the 20th of March, 1840, she was arrested, together with her cargo, at the suit of the bondholder.

An appearance was entered for the consignees of the cargo, and

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<sup>1</sup> [S. C. 1 Notes of Cases, 283.]

bail being given for them in the amount of 7,500*l.*, a *supersedeas* to the arrest was issued, as far as regarded the cargo.

The vessel was abandoned by the owners and sold under a decree of court, and the proceeds of the sale, amounting to the sum of 1,526*l.* 12*s.* 2*d.*, was brought into the registry.

The proctor for the consignees of the cargo also brought in the sum of 1,685*l.* 18*s.*, as the amount of freight due for the transportation of the cargo.

In the action against the ship and freight, judgment went by default; but the suit against the cargo was defended by the consignees, and an act on petition, and a reply and rejoinder, were severally given in, when further proceedings were stayed by an injunction obtained from the Court of Chancery, by the consignees of the cargo.

An application was now made to the court, by the bondholder, to direct the amount of the freight to be paid out of the registry, in addition to the proceeds of the ship, in part liquidation of the bond.

The application was opposed by the consignees of the cargo, upon the ground, that if the bond as against the cargo should be deemed invalid, the consignees would be entitled to their costs in the suit, out of the proceeds of the freight, in the first instance. It was also alleged by the proctor for the consignees, in his act, that [ \*314 ] he had arrested the \*proceeds of the freight and ship, at the suit of sundry seamen for wages.

In support of the motion, *Haggard* and *Harding*.

*Addams* and *Bayford*, *contra*.

PER CURIAM.

The bond in this suit purports to bind the ship, the freight, and the cargo: and in the commencement of the proceedings an action was entered against the ship and freight, and also against the cargo. No appearance having been given for the owners of the ship and freight, judgment by default passed against them, in the usual form; the action, however, has been defended by the consignees of the cargo, and the suit as against the cargo is still before the court, although the progress of it has been delayed by an injunction which has been obtained from the High Court of Chancery. An application is now made by the holder of the bond for the payment of the proceeds of the ship and freight, which have been brought into the registry of the court; and this application is resisted by the consignees of the cargo upon the ground that, if the bond, as it affects the cargo, should be pronounced to be invalid, the consignees would be entitled to be

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The Lord Cochrane. I W. Rob.

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indemnified for the costs of the proceedings out of the proceeds of the freight, before the balance is paid out to the bondholder. I may here also notice another objection, which has been incidentally raised against the payment of the proceeds of the freight, as prayed by the bondholder, namely, that a claim against these proceeds is now outstanding for wages alleged to be due to some of the seamen who served on board the vessel. The objection which has \*been thus raised I may at once dispose of with this single [ \* 315 ] observation, namely, that the objection does not come properly from the owners of the cargo; and if the alleged wages are due, the demand of the seamen should be made against the proceeds of the ship, which ought not to be delivered out until the payment of the mariners' claim is secured. Having disposed of this point, I now proceed to consider the more important objection which has been taken against the application of the bondholder in the present instance, namely, the lien which the consignees of the cargo assert they may possess upon the proceeds of the freight, if the proceedings against them are determined in their favor. Now, referring to my own experience of the practice in these courts, I cannot recollect any case in which it has been stated, that where an action is brought against a ship and cargo upon a bond of bottomry, and the owners of the ship have suffered judgment to go against them by default, the owners of the cargo have any lien upon the freight. Under ordinary circumstances, I apprehend, the freight would be paid out, as a matter of course, to the bondholder: and although circumstances might possibly be set up which might induce the court to hold its hand, those circumstances must be of a strong and special character; as, for instance, that the party suing upon the bond was resident abroad, and there was no possibility of compelling him to pay the costs of the suit in case he should be condemned in them. What are the circumstances which are alleged on the present occasion? It is not pretended, in this case, that the holders of this bond are insolvent, or not capable of paying the costs if they should be awarded against them; and I have no fact or circumstance \*before [ \* 316, ] me of which I can take any tangible notice. I cannot examine the probable validity or invalidity of the bond in this stage of the cause; still less can I anticipate that the proofs will preponderate in favor of the consignees of the cargo against the holders of the bond. In deciding upon the question which has been raised, I must consider it with reference to the facts of the case as they are now before me; and, confining myself to those facts, I must say, that nothing has been stated to show me that the owners of the cargo have any lien upon the freight which has been brought in, or that with respect



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The Vernon. 1 W. Rob.

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to the pending proceedings in this cause, they are entitled to litigate the suit upon a different security from other suitors, namely, the personal responsibility of the parties in the cause. I am, therefore, of opinion, that the lien which is here set up upon the proceeds of the freight cannot be sustained, and I must comply with the motion of the bondholder.

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THE VERNON, Gimblett.<sup>1</sup>

January 22, 1842.

Suit for damage by collision, occasioned to a foreign vessel off Dungeness.

Sentence pronounced, that the accident was occasioned solely and entirely by the default of the licensed pilot on board, under the provisions of the statute 6 Geo. IV.

Exemption of the owners from liability denied upon the ground that the pilot on board was not a duly licensed pilot within the locality where the accident occurred.

Construction of the act 6 Geo. IV. c. 125, sections 2 and 14.

Owners of damaging vessel not responsible.

*Semble*, the provisions of the 6 Geo. IV. equally apply in cases where the damage is done by a British ship to the property of foreigners, as in cases entirely between British subjects, upon the principle that when a remedy is sought to be obtained, the party seeking it must take it according to the law of the country in which it is to be enforced.<sup>2</sup>

In this case a suit was promoted by the owners of The Alsen, a Norwegian vessel, against The Vernon East Indiaman, for damage occasioned by collision at sea.

The collision occurred off Dungeness, upon the 12th of August last: The Alsen proceeding at the time up the Channel, bound to Christiansand; and The Vernon bound to the East Indies, and proceeding down the Channel under the charge of a Trinity-House pilot.

[ \*317 ] \* Upon the 13th January the cause was heard upon its merits before Trinity Masters, and, under their advice, the court pronounced that The Alsen was in no degree to blame, and that the accident was occasioned solely and entirely by the default of the Trinity pilot who was in charge of The Vernon.

A question of law was subsequently raised, as to the liability of the owners of The Vernon to make good the damage, under the circumstances of the case.

The counsel for The Vernon relied upon the exemption conferred

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<sup>1</sup> [1 Notes of Cases, 277.]

<sup>2</sup> [See *Pope v. Nickerson*, 3 Story, R. 465.]

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The Vernon. 1 W. Rob.

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by the General Pilot Act; The Vernon, it was alleged, being in charge of a pilot, under the provision of the statute, and the accident having been occasioned solely and exclusively by the default of that pilot.

For the owners of The Alsen it was contended — That the pilot in charge of The Vernon was not a duly licensed pilot, within the provision of the statute 6 Geo. IV. c. 125; that the second section of the act authorizes the Trinity House to license pilots to conduct vessels down to the Isle of Wight, “save and except as hereinafter provided,” and the fourteenth section empowers the lord warden of the Cinque Ports to license pilots within certain limits, and expressly provides, “that all vessels navigating within those limits, except as hereinafter provided, shall be piloted by pilots so licensed, and by no other pilot or person whatever;” that, under the exception thus marked out in the second section, and the express enactment contained in the fourteenth section, the pilot in charge of The Vernon was not duly licensed to conduct the ship within the locality where the accident occurred, and the fact of his being in charge \* would, consequently, work no exemption from liability in [ \* 318 ] favor of the owners, under the provisions of the General Pilot Act, which had been relied on. The circumstance that The Alsen was the property of foreign owners was also urged by the counsel for the owners of that vessel, in arguing the case.

For the owners of The Alsen, *Queen's Advocate* and *Haggard*.

For the owners of The Vernon, *Addams* and *Bayford*.

PER CURIAM.

According to the words of the act of parliament, and the construction which they have received in former cases of this kind, the owners of The Vernon are, *prima facie*, absolved from all responsibility for the damage which has been occasioned in the present instance. It has been said, however, that the principles of law which have been laid down in former cases do not apply to the circumstances of this particular case, and for this reason, namely, that it has been averred, in the act on petition, that the collision took place “out of pilot's water;” in other words, that the pilot on board The Vernon ought not to have been appointed by the Trinity House, but by the warden of the Cinque Ports. It has also been suggested by the counsel for The Alsen, that a further distinction between this case and the former cases arises from the circumstance, that the vessel which has received the damage is a foreign vessel. This circum-

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The Vernon. 1 W. Rob.

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stance, it has been urged, furnishes an important distinction, and entitles the claim of The Alsen to the indulgent consideration of the court; because there is no reciprocity, and if resort had [ \* 319 ] \* been made to a foreign court, the decision would have been different. Before I proceed to consider the particular sections of the statute which have been discussed in the argument, I may here observe that, upon the general principles of international law, whoever sues in the courts of any country must take the remedy which the law of that country allows. If a contract is made abroad, it may be expounded by the law of the country where it was made, or by the law of the country where it is to be executed; but where a remedy is sought to be obtained, the party seeking it must take it according to the law of that country in which it is to be enforced. This principle is distinctly laid down in the case of *Don v. Lipman*, which is reported in the fifth volume of *Clark & Finnelly*, p. 1. The judgment in that case was delivered in the House of Lords, upon grave deliberation, and the decision embraces all the authorities upon the subject. The question, in that case, was this, whether, upon certain bills of exchange which had been given in France, but which were to be enforced against the acceptor in Scotland, the Scottish law of prescription applied, more than six years having elapsed between the time when the bills became due and the action was brought. It was the opinion of the House of Lords that the remedy could only be obtained according to the law of the country in which the suit was to be entertained. The principle laid down in the case to which I have just adverted is, I apprehend, conclusive upon me in the present instance. I must consider myself bound by the decision in the House of Lords; and I wish it to be understood that, in all cases which may be brought before me, I shall endeavor [ \* 320 ] to \* administer equal and impartial justice, whether the subject-matter of the action be the property of British or of foreign owners. I must now advert to the particular sections of the 5th Geo. IV., which have been more immediately discussed, and upon which the counsel for the owners of The Alsen have mainly relied in support of The Vernon's liability for damage in the present instance. Looking to the wording of the sections in question, it appears to me that the case is attended with no doubt or difficulty whatever. By the second section it is enacted, in the following words:—"It shall be lawful for the Corporation of the Trinity House, and they are hereby required, after due examination, to appoint and license, under their common seal, fit and competent persons duly skilled to act as pilots, for the purpose of conducting all ships and vessels, sailing, navigating, and passing, as well up and

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The Vernon. 1 W. Rob.

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down, or upon the rivers Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, between Orfordness and London Bridge, as also from London Bridge to the Downs, and from the Downs westward, as far as the Isle of Wight." If this section had ended here, and there was no other section which might be put in conflict with it, the case would be perfectly clear; because the vessel was proceeding from London Bridge to the Isle of Wight, in charge of a Trinity House pilot; but these following words are added:—"And in the English Channel, from the Isle of Wight up to London Bridge." Now upon these latter words of the section some doubt might possibly arise if a Trinity pilot should happen to be in charge of a vessel coming from the Isle of \*Wight to [ \* 321 ] London Bridge; and it might be said that it was difficult to reconcile the section with the express enactment contained in the fourteenth section. The words of the fourteenth section are as follows:—"That it shall be lawful for the lord warden of the Cinque Ports and constable of Dover Castle, or his lieutenant for the time being, and they are hereby required to appoint and license fit and competent persons, duly skilled as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing from or by Dungeness, up the rivers Thames and Medway, to London Bridge and Rochester Bridge," &c. And then it further provides:—"That all ships and vessels sailing, navigating, and passing, as aforesaid, shall be conducted and piloted, within the limits aforesaid, by such pilots so appointed and licensed, and by no other pilot or person whatsoever." As I have already noticed, in the case of a ship conducted by a Trinity pilot from the Isle of Wight to London Bridge, some difficulty might, by possibility, arise in reconciling the two sections. In this case, however, The Vernon was proceeding under the charge of the pilot on board, from London Bridge to the Isle of Wight. The difficulty, therefore, does not arise in the present instance, and I am not called upon to express any opinion upon it.

As regards the circumstances of the case before me, I am satisfied in my own judgment, that no contradiction exists between the two sections. The second section, it appears to me, sufficiently empowers the Trinity House to license pilots for the purpose of navigating vessels from London to the Isle of Wight; and this authority is in no degree circumscribed by the terms of the fourteenth section. I am, therefore, of opinion that the pilot on board \*The [ \* 322 ] Vernon was a legally licensed pilot; and the damage having been occasioned, entirely and exclusively, by his default, I must pronounce that the owners of The Vernon are not responsible for the same.

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The Aurora. 1 W. Rob.

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THE AURORA, Clark.

January 22, 1842.

Appeal from magistrates' award in a case of salvage.

Application for leave to withdraw an act on petition, for the purpose of amendment, after a copy had been delivered to the adverse proctor in the suit, refused.

In a rejoinder, the matter pleaded must be confined to averments, which are responsive to the facts suggested in the reply, or corroborative of the original statement, but it is not competent to introduce entirely new matter.

Rejoinder of the appellants, defective in this respect, rejected.

IN this case, which was an appeal from the award of magistrates in cause of salvage, an application was made by the counsel for the appellants for leave to amend an act on petition, after a copy<sup>1</sup> had been delivered to the proctor for the respondents. A rejoinder was also given in by the appellants, the admission of which was opposed.

The court now delivered its opinion upon both points, and the proceedings in the case are fully noticed in the judgment of the court.

*Haggard and Robertson*, for the appellants.

*Addams*, *contra*.

[ \* 323 ]      \* JUDGMENT.

DR. LUSHINGTON. I have carefully considered the proceedings which have taken place in this case. It appears that in October last the salvage service in question was rendered to this vessel; that on the 30th of October the cause was heard before the magistrates at

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<sup>1</sup> The act on petition, after formally setting out the appeal and the amount of the award, simply alleged, "that the said pretended award is exorbitant and excessive, as well in respect of the value of the said ship and cargo as of the pretended services rendered by the said respondents; wherefore the said B. &c., &c."

The reply was as follows: "In the presence of C., who submitted that the said award is not excessive or exorbitant, either in respect of the value of the ship and cargo, as alleged by B., or otherwise; and by reason thereof, &c., &c."

The rejoinder set forth at considerable length the nature of the salvage service in question, the proceedings before the magistrates, a variety of contradictions of the evidence upon which the magistrates' award had been made, and of charges against the salvors and the official authorities at Caernarvon, and concluded with an averment, that an erroneous estimate had been taken of the value of the vessel and cargo, and that instead of ten or twelve thousand pounds, the whole value thereof did not amount to the sum of three thousand pounds.

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The Aurora. 1 W. Rob.

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Caernarvon, where one of the parties resided, and the sum of 400*l.* was awarded as a salvage remuneration. From this award an appeal was interposed by the owners of the vessel, and according to the statute the appeal must have been made within thirty days from the date of the award; consequently, from the time of the appeal, the owners had the whole of December and a part of January to consider the course to be adopted by them in the prosecution of their appeal. If they had been desirous to bring under the consideration of this court facts and circumstances which did not appear in the proceedings before the magistrates, according to a former decision of the court,<sup>1</sup> they were at liberty to have pleaded such facts in an act on petition; but in so doing they were bound to set forth all the circumstances intended to be brought before the court. What, then, has been the course pursued in the present instance? On the 3d of December, an appearance was given for the salvors, the respondents in the cause, and the owners, the parties appellant, were assigned to bring in their act on petition on the default day, the 5th of January. Previous to that day copies of an act on petition, signed by counsel, were delivered to the proctor of the adverse parties. The original act so delivered I now hold in my hand, and it is certainly one of a very \*anomalous description. It is not a mere nullity, nei- [\* 324 ] ther does it contain any thing very stringent. It merely states that the award of the magistrates is excessive, considering the value of the ship and the circumstances attending the salvage, but no other circumstances are specified. An answer to this act was given in on behalf of the salvors, simply denying that the award is exorbitant or excessive, and the appellants were assigned to bring in their reply thereto.

On a subsequent day a reply was brought in by the owners, the admission of which was opposed, and on the day when, according to the assignation of the court, the act on petition was to be closed, an application was made to me in court for leave to withdraw the original act on petition for the purpose of amending it, notwithstanding that copies thereof had been signed by counsel and delivered to the proctor on the other side. Under these circumstances I have now to consider the two following questions,—first, whether I can grant the application that has been thus made to the court, and, secondly, whether the matters set forth in the owner's reply are admissible in the stage of the proceedings in which they have been given in. Now, looking to the practice of the court, it appears to me, that I should

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<sup>1</sup> Case of *The Thomas Wood*, Robinson, A. R. part i. vol. i. p. 18.

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The Aurora. 1 W. Rob.

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break through all former rules and regulations in conceding the prayer which is now made on behalf of the owners of this vessel. In so doing I should entirely defeat the object for which the order for the delivery of copies of the proceedings to the parties in a cause was established. The proctor, when he receives the copy, is justified in

sending it to the parties for whom he is engaged, and upon [ \* 325 ] \* the contents of the copy so delivered the instructions for the responsive pleadings are framed. Unless, therefore, the whole of these proceedings were to be opened *de novo*, a precedent which would be attended with manifest inconvenience to the practice of the court, it would be an act of injustice to allow the appellants in this case to depart from the case which has been set up by them upon the present occasion. I must, therefore, reject the application, and, in so doing, I may observe, that the result would have been the same if the act on petition had been brought in upon the day regularly assigned by this court for its delivery. The next question, then, is, whether the reply which has been brought in by the owners can be admitted as responsive to the salvors' answer to the act on petition? It contains much new matter, consisting of charges against the magistrates, charges against the salvors, and also against the parties by whom the former proceedings are conducted.

In admitting a plea of this description, I should overthrow all the principles of pleading. The first step in all legal pleadings is the statement of the case intended to be set up by the party promoting the suit. The defendant next states his case in answer, and the promoter of the suit is then at liberty to reply to the facts suggested in the answer, or to corroborate his own original statement, but it is not competent for him to introduce entirely new matter. The court is at all times anxious to show indulgence when it can do so with propriety, but looking to the facts set forth in the plea now under consideration, I must hold that in admitting them I should [ \* 326 ] violate all the principles of \*pleading. I must therefore reject the reply of the owners as inadmissible.

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The Sophie. I W. Rob.

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## THE SOPHIE, Gustavus.

January 31, 1842.

In proceedings in the Court of Admiralty, the court will require security for costs to be given in cases in which the owners are resident out of the jurisdiction of the court.

The fact of a vessel being under arrest of the court in a former suit will not enable the court to apply its process for the enforcement of the payment of the costs of a second suit if it should be necessary.

In this case an action had been commenced against the owners of The Druid, a steam-tug belonging to the port of Liverpool, for damage alleged to have been wilfully committed upon The Sophie, a Danish sloop, upon the 12th of October last.

An act on petition was given in on behalf of The Sophie, and in bringing in the reply of the owners of The Druid, the Queen's Advocate moved the court to decree security for the costs of the suit to be given by the master of The Sophie, that vessel being a foreign vessel, and the owners being resident abroad, out of the jurisdiction of the court.

The motion was opposed on behalf of the owners of The Sophie by *Addams*, upon the ground that the application was altogether unnecessary, inasmuch that The Sophie was already under the arrest of the court in another suit, which had been brought against her for necessities supplied under the statute 3 & 4 Victoria.

## PER CURIAM.

It is undoubtedly a great hardship upon parties who are resident in this country to be sued where there is no chance of obtaining an indemnity for the costs, if they should be successful in the result of the suit. Upon this principle I am disposed, unless under particular exceptions, to require that security for the costs should be given in all cases in which the owners are resident out of the jurisdiction of the court. Looking to the practice of other [\* 327] courts I find this rule to prevail, both in the courts of common law and equity, and I shall certainly apply it in the present case, unless I find myself precluded by the objection, that The Sophie has already been arrested by the process of the court in another and a different suit. If I could satisfy my mind that having a hold of the vessel in another suit I could apply the process of the court to enforce the payment of the costs of this suit, if it should be necessary, I



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The Persian. 1 W. Rob.

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should decline to interfere in the present instance, because the principle would then fail upon which security for the costs is required, namely, that unless this security be given, the adverse party in the suit has no chance of obtaining his costs if he should be entitled to them. Under the circumstances of the case I am unable to arrive at any such conclusion; I must therefore direct security to be given, and shall fix that security in the sum of 100*l*.

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THE PERSIAN.<sup>1</sup>

January 31, 1842.

In cases of salvage the court is disposed to discountenance the taking out a commission of appraisement. Where the value of the vessel is disputed, and a commission is taken out, unless there be a great disparity between the value stated by the owners and the actual value, the party taking out the commission will be liable to the costs of the appraisement.

In this case, which was a cause of salvage, the owners of the vessel proceeded against stated the value of the ship to be 1,800*l*. The salvors, being dissatisfied with this estimate, took out a commission of appraisement, and the commissioners returned the value to be 1,780*l*.

In delivering judgment upon the merits of the case the court observed to the following effect: "In cases of salvage, unless there be a very great disparity between the value stated on the part of the owners and the actual value of the property, the court is greatly disposed to discountenance the measure of taking out a com-  
[ \* 328 ] mission of appraisement. \* Whenever such a commission is taken out, and ultimately appears that the party taking out the commission has done so in error, the court will enforce the rule, that the party so proceeding shall pay the costs which may be occasioned to the other party. In this case I must direct all costs attending the commission of appraisement to be borne by the salvors."

Upon the merits of the case the court pronounced a tender of 150*l*. to be insufficient, and awarded the sum of 270*l*.

For the salvors, *Queen's Advocate* and *White*.

For the owners, *Phillimore* and *Jenner*.

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<sup>1</sup> [ S. C. 1 Notes of Cases, 804.]

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The Eliza. 1 W. Rob.

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THE ELIZA, Walwick.<sup>1</sup>

January 31, 1842.

Costs of reference of disputed items in a bond of bottomry decreed against the bondholder — a reduction of nearly one fourth of the original demand being made by the registrar and merchants.

THIS was a question of costs in a cause of bottomry. The bond had been referred to the registrar and merchants, and had undergone in the registry considerable reductions, amounting nearly to one fourth of the original demand.

## PER CURIAM.

The only question which the court has to determine is as to the costs. It appears that the suit was originally brought by Baring, Brothers, & Co., the legal holders of the bond against Champion and others, the owners of this vessel. The parties against whom the suit had been commenced did not think fit to contest the general validity of the bond. They therefore acknowledged its legality in acts of court, and prayed to have the items referred to the investigation of the registrar and merchants. The result of this reference has been, that from the \*original demand of 606*l.* 9*s.* 7*d.* [ \*329 ] the bond has been reduced to the sum of 446*l.* 8*s.* 6*d.*; in other words, that nearly one fourth of the original claim has been disallowed. Under these circumstances the question arises, how far the bondholders are entitled to the costs? Now up to the period when the reference was directed, I think that they are clearly entitled to be indemnified in the expenses which they have incurred in enforcing the payment of the bond. Up to that period they had no option but to proceed in this court, for the purpose of establishing the validity of the bond. From the time however when the accounts were contested in the registry they must bear the consequences of the investigation, which they have themselves rendered necessary in asserting a demand so much larger than they have been enabled legally to maintain.

I therefore decree the costs to the bondholder up to the time only of the decree pronouncing for the bond, and I condemn the bondholders in the costs of the report, and in all costs of the suit occurring subsequently thereto.

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<sup>1</sup> [S. C. 1 Notes of Cases, 305.]

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The Zephyrus. 1 W. Rob.

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THE ZEPHYRUS, Blake.<sup>1</sup>

February 17, 1842.

Claim for salvage for rescuing the master and crew, the vessel itself not having been salvaged.

Construction of the statute 1 & 2 Geo. IV., c. 75, s. 8.

Provisions of 8th section confined to the magistrates at the outports, and confer no additional powers upon the Court of Admiralty in the first instance.

Not competent for the Court of Admiralty to decree a salvage award for the preservation of life alone.<sup>2</sup>

Claim of salvors rejected.

THIS was a cause of salvage, promoted by the master and crew of a Yarmouth life-boat, for rescuing the crew of *The Zephyrus*, under the circumstances noticed in the judgment of the court.

*Haggard*, for the salvors, referred to the 8th section of the statute 1 & 2 Geo. IV., c. 75, and to case of *The Queen Mab*, 3 Haggard, p. 242.

*Addams, contra*, for the owners.

[ \* 330 ] . \* JUDGMENT.

DR. LUSHINGTON. The substance of the present case may be stated in a few words; it is as follows: the persons who claim as salvors, whilst the vessel was in very considerable danger, made most meritorious efforts to render assistance. As regards the preservation of the ship and cargo those efforts were unsuccessful, but the asserted salvors were ultimately enabled to bring off from the wreck the master and the crew, and to land them in safety upon the coast of Yarmouth. Under these circumstances, a suit has been instituted, and the act on petition of the parties suing concludes with the following prayer: That the court would decree them such amount of salvage as may be fitting, "for having been instrumental in saving and having saved the lives of the crew and the master." The first question that arises is this, whether, under the general principles which govern the practice of this court, I have any authority to

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<sup>1</sup>[S. C. 1 Notes of Cases, 338.]

<sup>2</sup>[*The Aid*, 1 Hagg. Ad. R. 84; *The Ardincaple*, 3 Hagg. Ad. R. 153; *The Emblem*, 1 Davies's R. 61.]

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The Zephyrus. 1 W. Rob.

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make an award of salvage against the owners, where the vessel has not been actually saved? In considering this point, I must examine it in the abstract, without importing into the consideration the fact that life has been rescued, or the act 1 & 2 Geo. IV., which has been relied on by the counsel for the salvors in the present instance. Now I apprehend that, upon general principles, a mere attempt to save the vessel and cargo, however meritorious that attempt may be, or whatever degree of risk or danger may have been incurred, if unsuccessful, can never be considered in this court as furnishing any title to a salvage reward. The reason is obvious, namely, that salvage reward is for benefits actually conferred, not for a service \*attempted to be rendered. Dismissing, therefore, from my [ \* 331 ] consideration the endeavors which are stated to have been made by the salvors to save the property of the owners, I next proceed to consider the more material ground upon which the claim of the promoters of the suit is founded, namely, the successful rescue of the master and the crew who were on board the vessel at the time. Now, looking to general principles and to the established practice of the court, I am, clearly of opinion, that this court has no authority to direct a salvage award, upon the ground alone, that the lives of persons on board a vessel in distress have been preserved by the successful exertions of the parties suing. The jurisdiction of the court, in salvage causes, is founded upon a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life. The authority of decided cases is directly against any such proposition, and I have always understood it to have been settled by Lord Stowell as the law of the court, that it is impracticable for parties to prefer a salvage claim in the Court of Admiralty, merely on account of having saved the lives of individuals from impending danger or destruction. Does, then, the 8th section of the act of parliament, which has been referred to, confer upon the court any jurisdiction upon these matters, which it did not possess antecedently to the passing of the statute. The words of the 8th section are these: "or for being instrumental in saving the life or lives of any person or persons on board the said ship or vessel." Now the whole of the 8th section, it is to be observed, refers not to any power which is to be exercised \*by the [ \* 332 ] Court of Admiralty; but is intended solely to give additional power and authority to the magistrates at the outports to award salvage. Can I then come to the conclusion that the words of the statute, which simply purports to bestow certain additional powers, and confines those powers solely to the commissioners of the

Cinque Ports and the justices of the peace, confer upon the court an authority which it did not previously possess?

Before I take upon myself to exercise an authority so at variance with the former practice of the court, I must be satisfied, either by direct expressions, or by necessary implication from the words of the statute, that I am justified in so doing. The 8th section of the act which has been referred to conveys no such conviction to my mind. Whether it gives authority to the magistrates or the commissioners of the Cinque Ports to entertain questions of salvage, under the circumstances of this case it is unnecessary for me to determine. If it does confer upon them this authority, it may incidentally, by way of appeal, confer upon this court also a power to interfere. In the first instance, however, it is clear, in my judgment, that the act in question does not bestow any additional authority upon the court, which the court was not entitled to exercise before the passing of the act. These observations dispose of the questions which I have been called upon to determine in this case, but before I conclude I will shortly advert to another point that has been pressed upon the court in the argument of the counsel for the salvors. It has been said, that in a former case the court has entertained the question, and awarded a salvage remuneration, under circumstances precisely similar [ \* 333 ] with the present case, \*and, in support of this assertion, the case of *The Queen Mab*,<sup>1</sup> decided by Sir John Nicholl, has been cited.

In that case it is evident that *The Beulah* rendered no assistance whatever of a salvage character to the property of the owner of *The Queen Mab*, but she did rescue the lives of the master and crew, and the act on petition in support of the salvor's claim expressly referred to the eighth section of the act of parliament which has been referred to in this case. The learned judge, therefore, who decided that case, must have had all the circumstances under his consideration, and he awarded the sum of 30*l.* to *The Beulah* for the assistance she had rendered in the preservation of the lives of the crew. Looking to the general circumstances of the two cases, it is undoubtedly difficult to find any material distinction between them. I cannot see any sound distinction between the case of a vessel salvaged by one set of salvors, and the crew by another, and a case in which the crew were rescued and no assistance whatever was rendered to the vessel. One consideration, however, suggests itself with reference to *The Queen Mab*, which it is not unimportant to notice, namely, that the vessel

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<sup>1</sup> [3 Hagg. Ad. R. 242.]

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The Ocean. I W. Rob.

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was a derelict; and Sir John Nicholl, in awarding a remuneration to The Beulah, had not to contend with any opposition on the part of the owners of The Queen Mab. I cannot, therefore, suppose that Sir John Nicholl intended his decision in The Queen Mab to be regarded as a deliberate and binding decision; and I feel that I am doing no disparagement to that learned judge, in not considering it as conclusive upon me in the opinion which I have formed with respect to the present case.

\* I therefore reject the claim of the salvors, but I shall not [ \* 334 ] condemn them in the costs.

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THE OCEAN, Witham.

February 25, 1842.

In salvage causes where damage has been sustained by the salvors' vessel, a tender to stop the action, and entitle the party making it to the benefit of a tender in court, must include the amount of the damage which has been sustained.

In this case, which was a case of salvage, a tender of 20*l.* had been made by the owners, and rejected by the salvors.

It was stated by the salvors in their act on petition, that their vessel had sustained considerable damage in rendering the assistance. This was not denied by the other side, and it was also admitted by the owners that the tender which had been made, was confined to the salvage service alone, and was not intended to cover the expenses of the alleged damages.

In deciding upon the merits of the case, the following observations were made by the court.

" If my judgment was to be formed simply upon the services which have been performed, I should not be disposed to say that the tender was not a sufficient and adequate reward. In deciding the case, however, I cannot leave out of the consideration the circumstance which has been stated by the salvors in the petition, and is not denied on the other side, namely, that the steam-vessel has been in some degree damaged in rendering the services in question. It is admitted by the owners that the sum of 20*l.* which has been tendered, is not intended to cover the expenses of repairing the alleged damage; it is clear, therefore, that if I were to pronounce for the tender as sufficient for the services, it would be no compensation for the damages, and in order to fix upon the owners of The Ocean the further ex-

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The Whilemine.. 1 W. Rob.

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[ \*335 ] \*pense of repairing these damages, it would be necessary to ascertain their real extent, in the first instance, by a reference to the register and merchants. I am, therefore, under the necessity of overruling the tender, and I wish it to be understood, that where it is alleged in act on petition, that certain services have been rendered, and certain damages incurred, a tender to stop the action and to entitle the party making it to all the benefits of a tender in court, must include all the damages which may have been sustained.

Tender overruled. 45*l.*, inclusive of damages, awarded, together with the salvors' costs.

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THE WHILEMINE.

March 2, 1842.

A proctor of the Court of Admiralty personally condemned in the costs of the suit for not setting forth the names of the parties for whom he appeared, when directed so to do by a decree of the court.

THIS was a cause of salvage promoted by the master, the owner, and crew of the steam-vessel Robert Burns, against The Whilemine, a Hanoverian galliot.

Upon the merits of the case, the court being of opinion that no salvage service had been rendered, dismissed the owners of the galliot and condemned the asserted salvors in the costs of the suit.<sup>1</sup> Upon a subsequent court day, June 29th, the costs not being paid, the court, upon motion by the proctor for the owners, assigned the proctor for the asserted salvors to set forth his client's names,<sup>2</sup> and, in obedience to the decree of the court on the 5th of July, the proctor for the salvors brought in the register of the steam-vessel, in which it appeared that a Mr. Robinson was the sole registered owner.

[ \*336 ] It was also stated by the proctor for the salvors that \* he did not know who his parties were; the action being entered for the master, owner, and crew generally, as a matter of course, in the usual form in cases of this kind. A monition was issued against Mr. Robinson for the payment of the costs, and an appearance being given, it was alleged in his behalf, that he had been no party to the original action, which had been entered without his sanction or

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<sup>1</sup> [See the report 1 Notes of Cases, 376 ; S. C. 2 Notes of Cases 19, 213.]

<sup>2</sup> [See 1 Notes of Cases, 380.]

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The *Whitelmine*. I W. Rob.

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knowledge. The court therefore dismissed him with his costs. The proctor for the owners then prayed for a monition against the proctor for the salvors to fix him personally with the costs, when the latter prayed to be heard on his petition in objection to the said monition.

An act on petition was given in, and the question was argued by *Addams*, for the proctor of the salvors.

*Haggard* and *Harding*, for the owners of The *Whitelmine*.

JUDGMENT.

DR. LUSHINGTON. The question which has been mooted in this case is of serious importance as regards the practice of this court, its course of proceeding, and its power of enforcing its decrees. I regret, indeed, that the discussion has taken place, because I believe that such a discussion must be detrimental to the best interests of the profession, and because it also relates, in some degree, to the personal conduct of an experienced and respectable practitioner of the court. I must, however, address myself to the question which I have to decide, and determine it according to the best of my ability, in the manner which I think the justice of the case requires. Now, looking to the ancient practice of the court, it is perfectly clear that the rules, with regard to \*appearances in the Court of Admi- [ \* 337 ] ralty, were originally the same as are now adopted in the ecclesiastical courts.

In the more modern practice of this court, these rules, it is true, have been relaxed for the convenience of the practitioners, and for a period of probably not less than two hundred years proctors have been permitted to appear on behalf of parties suing without being called upon to exhibit any proxy, as is the indispensable custom in the Ecclesiastical Courts. The first question, then, which I must consider in the present instance, is this:—what is the duty and what the responsibility attaching upon a proctor who so appears without exhibiting a proxy? Upon general principle I apprehend that the court is entitled to expect from such proctor, when he does appear, that he be duly authorized by some person having an interest in the cause in issue, or that he should have a justifiable and strong ground for believing that the individual for whom he appears has such an interest. I apprehend, further, that at any period of the cause, and at any time before the case is dismissed out of court, the court has a right to call upon that proctor to state, not generally, but specifically by name, the whole of the parties for whom he is authorized to appear. The authority of the court to make this demand upon the proctor is, I conceive, inherent in the jurisdiction of this court in com-



mon with all other courts, and is absolutely essential to the due administration of justice, for the purpose of preventing unauthorized litigation. If it were otherwise, what would be the consequence in regard to the proceedings in this court? The consequence would be that proctors might appear for individuals who either were not in existence, or for persons who gave no authority, or who, [ \* 338 ] assuming the names of others, might take the chance of a decree being made in their favor, without, at any time, being obnoxious to the consequences of an unsuccessful litigation. In reference to the circumstances of this particular case, it has been contended in argument, that, admitting that the proctor for the asserted salvors was bound to exhibit a proxy when demanded, or to set forth the names of the clients who authorized his appearance; yet the proctor for the owners of The Whilelmine should have made the demand at an earlier period of the cause, and that having neglected to make the demand he is precluded from enforcing it in this stage of the proceedings. Now, in my view of the question, this position cannot be maintained, and for this reason, that the demand for the exhibition of a proxy is contrary to the ordinary practice of the court, and, as far as my experience extends, I am not aware of any instance within my own recollection in which such a demand has been made. I cannot think, therefore, that, unless there be very peculiar circumstances in the case, a proctor, in not making the demand, could be chargeable with laches, or be deemed in any measure in fault for following a precedent which has thus been sanctioned by the long-continued and uniform practice of the court itself. It has, indeed, been suggested, that there is this peculiarity in the circumstances of the present case, namely:—that it is a cause of salvage, and the salvage service has been directly put in issue; it is, therefore, a case in which the owners of the vessel proceeded against, if successful, would have been entitled to their costs, and, consequently, the precaution should have been adopted. If this doctrine were to be received, there is [ \* 339 ] scarcely a case of salvage or of collision which would not afford the same pretext for a demand for the production of a proxy. If I were to sanction the argument which has thus been advanced, I must go a great deal further, and hold, that in every case whatever in which the party proceeding may possibly be condemned in the costs, in order to recover those costs the proctor for the party proceeded against must, of necessity, demand a proxy. The consequence of such a doctrine must clearly be, that the proceedings in this court would be embarrassed to an extent difficult to be defined, and the suitors would be put to such inconvenience as would almost deter them from resorting to this court at all. I am of opinion, there-

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The *Whilimine*. 1 W. Rob.

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fore, looking to the circumstances of this case, that the proctor for the salvors was bound to be prepared with the names of those persons who authorized him to proceed, and that no laches is imputable to the proctor for the owners of *The Whilimine* in not demanding a proxy, and in not requiring the names to be set forth in the earlier stages of these proceedings. Having stated my opinion upon this part of the case, I must now advert to a topic which has been pressed in argument, and which is of considerable importance, although, perhaps, it may not require an immediate decision in the present instance; I allude to the case which has been suggested, where a party having authorized a proctor to appear for him, and no proxy having been demanded, such party having been condemned in the costs, should endeavor to evade the payment of those costs, upon the plea that he had not given any proxy to the proctor proceeding for him. I am not aware that this question is likely to be raised upon the present occasion; thus much, however, I feel it my duty to intimate most distinctly, that, if any such question should ever occur, [ \*340 ] and the party condemned in the costs should refuse to pay the costs awarded, I would most assuredly attach him; and if he thought that that attachment was not according to due course of law, I would leave him to resort to some other court for the purpose of obtaining his redress. In declining to pursue this course I should be guilty of the greatest injustice; for what would be the effect of my holding back the exercise of the court's authority under the circumstances I have stated? An individual would give his authority to a proctor to enter into a litigation on his behalf, and would take the benefit of a decree if the result of that litigation should be in his favor; but if it should so happen that the decree was adverse to him, he would be in a situation to turn round upon the court and defy the execution of its power to do justice to the other party. I cannot conceive such to be the law or practice of the court. I apprehend the practice of the court to be this, that a proctor is at liberty to commence or defend a suit upon his own responsibility without the production of any proxy, and that he is bound to produce his parties before the court when called upon so to do.

This, in my apprehension, is the rule of practice which the court is bound to enforce, and I should be most reluctant to depart from it by requiring a proxy to be exhibited, because it is perfectly obvious that such an alteration of the rule would be highly injurious to the proceedings in the court, and would defeat the main object of its summary jurisdiction, namely, that the proceedings should be as expeditious and inexpensive as possible. Without entering minutely into the details of the case itself, it may be \*expe- [ \*341 ]

dient that I should now briefly advert to the proceedings which have taken place in the cause. The action was originally an action of salvage, in which an appearance was given for the asserted salvors by the proctor against whom the monition is now prayed. The court was of opinion that no salvage had been rendered, and pronounced its decree accordingly, condemning the alleged salvors in the costs of the suit. In terms, the decree condemned the master the owner, and the crew, conforming, as a matter of course, with the terms in which the original action was entered. The monition for the payment of the costs as awarded was taken out, not as against the owners, the master, and crew, but against the owners of the steam-vessel alone. In thus selecting to proceed against the owners alone for the payment of their costs, the owner of The Whielmine was, I think, most fully justified under the circumstances of the case; for although, in point of law, all the parties so condemned are equally responsible for any part or for the whole, it is not to be conceived that the master and crew of a vessel of the description of The Robert Burns would be capable of obeying a monition taken out against them for the payment of the costs; indeed, under ordinary circumstances, it might be considered as a matter of vexation to proceed against persons in their condition of life, and not against the owners, who are infinitely more responsible in point of pecuniary circumstances, and equally responsible in point of law. The owners of The Whielmine having thought fit so to proceed, called upon the proctor for the salvors to set forth the names of his parties, the owners of

The Robert Burns; and here, I regret to say, the proctor [ \* 342 ] for the asserted salvors, when so \*called upon, adopted a course which, in my judgment, was neither prudent nor justifiable. It was his duty, when so called upon, to have set forth, at the earliest moment, the names of the agent or agents who authorized him to appear, and to have stated that he believed them to be the agents of the Commercial Steam Company, or any other company, whatever it might be. If he had done so, and at the same time had represented that he had considerable difficulty in ascertaining the precise names of the individuals composing the company, it would have been open to the court to consider what measures to adopt before proceeding further; and, in considering those measures, the court would, undoubtedly, have been most anxious to have protected the proctor from the consequences.

It is a matter of deep regret with the court that the conduct pursued by the proctor for the salvors was of a widely different complexion. Upon the 5th of July, in obedience to the orders of the court, the register of the steam-vessel was brought in; a monition

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The Canadian. 1 W. Rob.

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was issued against Mr. Robinson, who was entered in the register as the sole owner of the vessel, and the proceeding was utterly useless, Mr. Robinson having given no authority to the proctor to proceed in the cause, and the action having been brought entirely without his sanction or knowledge. This circumstance must of necessity have been within the knowledge of the proctor when he so brought in the register.

It has been said that there is no precedent for the course which I am about to pursue. I am thankful that, there is none, and I trust that this case is, and will continue to be, an isolated case. I have no doubt whatever in my own mind of the power of the court \* to proceed against the proctor, under the authority with [ \* 343 ] which it is invested over all its practitioners, and that power I shall certainly exercise upon the present occasion. What would be the consequence if the court were to withhold its hand under the circumstances of this case? Here is a foreigner accidentally coming to this country, who is unjustly charged with a demand for salvage which is not due. He is exposed to a long litigation, and subjected to much vexation and expense, and for this the only indemnity awarded to him is the recovery of the costs which he has actually incurred. What a disgrace it would be to the character of this nation in its administration of justice, if this court, having awarded to him this indemnity, should not have the power to enforce its decree. Under the circumstances of the case, therefore, I think it my duty to condemn the proctor in the costs of the original suit, and of the costs of the monition taken out against Mr. Robinson, which were unnecessarily occasioned by his not coming forward and stating the actual circumstances of the case, and I further condemn him in the costs of this petition.

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THE CANADIAN, Dixon.

March 2, 1842.

In causes of collision, the party intending to take the benefit of the stat. 6 Geo. IV. should state such intention in the pleadings; but the omission to do so will not deprive him of the exemption from liability conferred by the statute — the act being a public act, which the court is bound to take notice of without its being specially pleaded.

IN this case the vessel, whilst proceeding from Margate to London, with a duly licensed pilot on board, came into collision in the river

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The Canadian. 1 W. Rob.

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Thames with the sloop *The William and Mary*. The Trinity Masters, by whom the court was assisted, were of opinion that the accident was occasioned solely by the neglect and want of skill of *The Canadian*, and that the pilot who was in charge of the vessel was exclusively to blame.

[ \* 344 ] \* An argument was subsequently raised with respect to the claim of the owners of *The Canadian* to be exonerated under the provisions of the stat. 6 Geo. IV.

*Dr. Addams*, for the owners of *The William and Mary*, objected to the application of this statute in the present case, inasmuch that if the owners of *The Canadian* had intended to rely upon this defence, they should have pleaded the act 6 Geo. IV. c. 125; that the act was not pleaded, neither had it been in any manner suggested in the opening of the case by owners' counsel, that the act would be relied on. The defence was simply rested upon the denial of the fact that the accident was caused by the default of *The Canadian*. This defence has been overruled by the Trinity Master, and the owners of *The Canadian* were consequently concluded by the sentence already pronounced.

*Dr. Haggard*, for the owners of *The Canadian*, submitted — That the question of fact having been determined against *The Canadian*, it was perfectly competent for the owners of that vessel to fall back upon their legal defence; that such defence being founded upon the provisions of a general act of parliament, it was not necessary to have specifically pleaded the act of parliament in the act on petition; that it had been sufficiently averred in the pleadings, as one ground of defence, that the vessel was in charge of a pilot. In the reply, it was pleaded in these words: — "That on the 17th of October last the brig was off Gravesend; that a duly licensed pilot got her under weigh; that during the premises the brig was in charge of a

[ \* 345 ] \* duly licensed pilot, and his orders duly obeyed by the crew of the vessel; and the said collision was not occasioned in any degree by the wilfulness or carelessness of those on board the brig, but was solely attributable to the persons on board the barge." These words were sufficiently explicit, and were, moreover, in accordance with the form of pleading pursued in the case of *The Vernon*. In *The Vernon* it was simply pleaded in these words, "That the vessel proceeded on her voyage under the charge of Grice, an experienced and duly licensed pilot."

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The Duke of Clarence. 1 W. Rob.

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## PER CURIAM.

I certainly feel in this case that the mode of pleading is not altogether satisfactory to my mind, but I doubt whether I should be enabled (certainly not in this case) to lay down any rule on the subject, which would be generally approved of. When a collision has taken place and proceedings have been instituted, the first plea almost uniformly is, "Not to blame at all;" then follows a second defence, "If our vessel is in fault, apply to the pilot, not to us." If I was to lay down a rule, it would be, that the party intending to take the benefit of the statute 6 Geo. IV. should state his intention of so doing in the pleadings. The whole course of the proceedings in these causes, long before and since the passing of the act, has been exceedingly loose. As the act of parliament, however, is a public act, the court is bound to take notice of it without its being specially pleaded. I must therefore follow in this case the course adopted in the case of *The Vernon*, by holding the owners of *The Canadian* not responsible for the damage.

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\* DUKE OF CLARENCE, College.

[ \* 346 ]

March 4, 1842.

Ordinary labor, as applied to a salvage service, implies that labor which may be performed by an individual not possessed of nautical skill, but of mere strength of arm and limb. Such labor when united with nautical skill must be estimated by a somewhat higher value than mere ordinary labor.

THIS was a question of salvage.

*Addams* and *Robertson*, for the salvors.

*Phillimore* and *Jenner*, *contra*.

In the course of the judgment the court observed,

It has been said that the service in this case is a service of mere ordinary labor, and if so, the tender which has been made would have been a sufficient satisfaction; but it should always be borne in mind, where the service is alleged to be one of mere ordinary labor, what is the particular meaning of this expression; and I apprehend the term, as applied to questions of salvage, to mean that labor which may be performed by an individual not possessed of nauti-



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The *Alexander*. 1 W. Rob.

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behalf of the owner it was alleged in reply, "That in the month of July, 1835, the said ship being in the river Thames, A. S., her then master, purchased from the plaintiff an anchor and chain cable, and other articles set forth in the account, for his own private use and adventure, and not for the use of the said ship; that when the said A. S. so purchased them, he informed one of the plaintiffs that they were not for the service of the ship, and that a letter was subsequently sent to the said A. S., personally, demanding from him the payment of the amount. The reply also further alleged that the ship, at the time the anchor and cable were sent on board, was not in want thereof, being furnished with her proper number, namely, two anchors, of the respective weights of thirteen hundred weight, and twelve hundred weight, and which were the same that were on board when the said ship sailed from Drobak in the preceding \* month of June, and when she returned thereto, having [ \* 348 ] been in constant use both in the outward and homeward voyages. Lastly, that the anchor and cable sued for were never used on board nor taken into the stores of the said ship, but were sold by A. S. on a subsequent voyage, at the port of Havre-de-Grace, for his own account and benefit.

A rejoinder to this reply was given in by the material men, denying that the articles were furnished for the private use of A. S., and alleging that the said articles were ordered by and supplied to said A. S. in the capacity of master of the said ship, and as the agent for the owners thereof; that after the said articles had been put on board A. S. called at the counting-house of the plaintiff's for the purpose of obtaining the account, and upon such occasion he admitted to N. F., at that time a clerk in the plaintiff's service, that the said articles had been supplied for the use of the ship, and were chargeable against the owner thereof, and the account was made out accordingly in the name of the owner and signed by the said A. S.; that the letter alleged to have been addressed by the plaintiff to the said A. S., demanding payment for the goods, was addressed to him as the agent for the owner, by whom the order for the goods had been given, and that the master who succeeded the said A. S. in the command of the vessel has often been at the plaintiff's counting-house subsequent to the transaction in question; that frequent applications have been made to him by the plaintiffs requesting him to bring the matter to the notice of the owner, and that he has frequently promised to procure settlement thereof from his employer, but has never given the least intimation that the said account was due and owing by the said A. S. and \* not by the owner of the ship. Lastly, that the only [ \* 349 ]



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The Alexander. 1 W. Rob.

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intimation ever received by the plaintiff from A. S., or the owner of the ship or any other person for his behalf, that the amount of the necessaries in question were chargeable to A. S. and not to the owner, was a letter from B., the plaintiff, bearing date 10th March, 1840,<sup>1</sup> and purporting to be indorsed with a memorandum signed by the said A. S.,<sup>2</sup> and which was annexed as an exhibit in the cause.

For the material men, *Addams* contended, That the articles for which the action had been brought were in their nature strictly necessaries, and although it was alleged in the owner's reply to the act, that two anchors and cables were on board at the time, *non constat* that it was not expedient, under the circumstances, that a third anchor should have been supplied. The *Alexander* was a vessel of considerable burthen, and at the time when the anchor and [ \* 350 ] capable were furnished was about to proceed upon her return voyage to a port in Norway. It was fairly to be assumed therefore both from her size and the voyage in which she was engaged, that a third anchor, if not indispensably requisite, was at least not superfluous to the safe navigation of the ship; that in cases of salvage claims, in which the probable danger of the vessel saved was a main ingredient in the estimate of the salvor's services, frequent cases had occurred where the loss of a third anchor on board vessels of this class had been pleaded; and it was well known in the practice of the court that great consideration had been generally attached to this circumstance in the judgment of the court. That it was unnecessary to pursue this point further in the present instance, for this reason, that, looking to the defence which had been set up in the owner's plea, the issue in the cause appeared to be, not that the articles were

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<sup>1</sup> Letter from B., the owner of The *Alexander*.

Drobak, 10th March, 1840.

"Gentlemen, — I have duly received yours of the 14th ult., by which I observe that Captain Sorenson is indebted to you in the sum of 46l. 13s. I have nothing to do with the payment of the said amount, as I know that my ship *Alexander* has never got any of the goods mentioned, but the Captain says he bought them for account of Coulson, of this place. The said Mr. Sorenson is declared a bankrupt, for your information. I am highly dissatisfied by being demanded to pay an account which does not concern me, and beg you not to trouble me with further correspondence on the subject."

<sup>2</sup> Indorsement upon the owner's letter, purporting to be signed by A. S.

"My debt to you, 46l. 13s., I have always acknowledged, but this matter does not concern my owner, Mr. J. M. Burchadt. When I, in the course of this year, was constrained to surrender my estate to the Bankruptcy Court, I at the same time notified your claim, and you will derive equal privilege with the other creditors."

\* The Alexander. 1 W. Rob.

unnecessary, but that they had been supplied to the master on his own private account, and not for the use and benefit of the ship. That the defence thus set up rested for its support upon the single testimony of Sorenson, the former master, with respect to whose evidence it was to be noticed that it was the evidence of a person deposing in favor of his own brother-in-law, and was directly at variance with his own admission at the time, and also with the documentary evidence which was before the court, namely, the account which had been sent in by the material men for the articles now sued for. To this account Sorenson had himself subscribed his name as a voucher for its accuracy, and in the very heading of it the account was expressly made out in the name and to the credit of the owner of the ship. Lastly, that no \*collusion was suggested, nor was any laches imputable to the material men upon the present occasion; they had supplied the goods at the request of the master, the agent of the owner, and, as they directly swear upon the understanding that they were for the service of the ship. It was therefore quite sufficient to fix the responsibility upon the owner, that the articles supplied were *per se* necessary articles, and such as it was fairly within the scope of the master's authority to order. That tradesmen and material men, in furnishing supplies to a ship, were not bound to look beyond this consideration, and it never could be expected that they should overhaul a vessel for the purpose of ascertaining whether she was really in want of the articles ordered or not.

For the owner, *Jenner, contra*. Admitting the articles in question to have been supplied at the request and instance of the former master, it was still incumbent upon the plaintiff in the suit to show not only that they were *bona fide* supplied for the use of the ship, but that they were actually necessary for her service at the time when they were ordered. According to the doctrine laid down by Lord Tenterden in his work on Shipping, it was upon this principle alone, that the liability of owners for the amount of goods supplied to their masters was founded. It has been said in the argument for the material men, that the goods supplied in this case were, in their nature, strictly necessary articles, and undoubtedly, in a general acceptance of the term, it could not be denied that they were so. In applying the term necessary, however, to cases of this kind, the term must be taken under limitation, namely, that the articles were necessary at \*the particular time when and under [ \*352 ] the particular circumstances in which they are furnished.

For the sake of illustration, the case might be taken of a vessel put-

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The Alexander. 1 W. Rob.

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ting into port after a storm, with the loss of her anchors; in such a case no doubt could be entertained that a fresh supply of anchors would be strictly necessary. Could it, however, for a single moment be contended, that an indefinite supply of anchors would, in such a case, be justifiable, and that the owners would be responsible for the same, if taken on board by the master? Unquestionably not; and, in its application, the principle was the same, whether one single anchor, or fifty anchors more than the necessary complement, should be taken on board. How far, then, did this principle attach to the circumstances of the present case. The plaintiffs in the suit contented themselves with the mere general averment, that the articles were necessary for a ship, without specifically showing that they were necessary for the particular ship now proceeded against. They had, therefore, failed in discharging themselves of that proof which the law required, for the establishment of their claim, and upon this ground alone the owner of *The Alexander* would be entitled to be dismissed. But the defence upon the present occasion did not rest upon the mere failure of proof on the other side. It was expressly sworn in the affidavits before the court, that the vessel was supplied with the ordinary number of anchors, namely, with the same number with which she had sailed upon her former voyages; it was also further sworn that they were never used nor received into the stores of the vessel. It

was clear, therefore, that even admitting they had been [ \* 353 ] ordered by the master as for the service of the ship, \* the master, in so ordering them, had exceeded his authority, and could not, in so doing, bind the responsibility of his employers. This was the principle of the maritime law, as laid down by Lord Tenterden, and the same principle was to be found in the practice of the common law courts, in the analogous cases of clothes supplied to infants, and goods furnished to wives living apart from their husbands. In the former case, if proper clothes are supplied to an infant by his father, any others which a tradesman may think proper to supply would not be considered as necessities, and the father would not be liable for them. It is incumbent upon a tradesman, before he trusts an infant for what may *per se* appear necessary, to ascertain whether he is sufficiently provided by his friends. *Ford v. Fothergill*, Peak, 229; s. c. 1 Esp. 211; *Cock v. Denton*, C. & P. 114. So also in the case of a wife not cohabiting with her husband, if a tradesman trusts the wife, the husband is only liable for what may be strictly necessities under the circumstances, and it is the duty of the tradesman seeking to charge the husband for the amount, to make out, by proof that he is actually liable. *Waithman v. Wakefield*, 1 Campbell, 121; *Clifford v. Clifford*, 1 M. & M. 102; 3 C. & P. 15. Lastly, with

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The *Alexander*. 1 W. Rob.

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respect to the asserted admission of the master, that the owners were liable for the articles in question, the admission was directly repudiated in the affidavit of Captain Sorenson, and was moreover inconsistent with the act of the material men themselves, in the personal demand which they had made upon Captain Sorenson for the payment of the amount in question.

## \* JUDGMENT.

[ \* 354 ]

DR. LUSHINGTON. This is a proceeding against a foreign ship, for a sum of money alleged to be due for the supply of an anchor and cable furnished to the vessel in the month of July, 1835. In the commencement of the suit, an appearance was given for the owner under protest, and the jurisdiction of the court was denied upon the ground that the cause of action originated prior to the passing of the statute 3 & 4 Vict. c. 65, and that the statute in question gave no jurisdiction when the cause had arisen before the passing of the act. The protest was argued upon a former court day, and the court was of opinion, that under the provisions of the act, it was competent for the court to adjudicate in the matter in question. An absolute appearance for the owner was accordingly directed, and the case now comes before me upon its merits; and as it is the first contested case which has arisen under the act, I have felt it my duty to give my best attention to the facts and the law of the case, as they present themselves for consideration. Now, it is not denied in the present instance, that the anchor and cable were ordered by the master, and put on board the vessel proceeded against. A twofold defence, however, has been set up by the owner, against the claim of the material men; in the first place it has been alleged that the articles in question were supplied, not for the private adventure of the master himself, and upon the credit of the owner; and, secondly, it is alleged, that under the circumstances of the case, they were altogether unnecessary. It has been said by the counsel for the material men, that the necessity has not been put in issue in the pleadings; but

\* I cannot agree that the defence upon this ground has not [ \* 355 ] been specifically pleaded in behalf of the owners. In the reply to the act on petition, I find it alleged in the following words: "And he further alleged that the said ship or vessel was not, at the time the said anchor and cable were sent on board, in want thereof, she being furnished with her proper number, to wit, two anchors of the respective weights of 13 cwt. and 12 cwt., &c., &c." And again, in a subsequent part of the reply it is set forth as follows: "And he further alleged that the said anchor and cable were never used on board the said ship, nor ever taken into the stores of his said party, &c., &c."

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The Alexander. 1 W. Rob.

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The statement, therefore, thus set forth in the owner's reply to the act on petition, directly puts in issue the fact which has been discussed in the argument, namely, whether the articles for which the present suit is instituted were necessary or not? In determining the case, then, the first point which I have to consider is, whether it has been sufficiently proved by the evidence that the master of The Alexander, at the time he gave orders to the plaintiff for the anchor and cable, ordered them upon his own private adventure and account, or whether they were supplied for the service of the vessel and upon the credit of the owner. If the fact be established as alleged by the owner, namely, that the master informed the plaintiff at the time the order was given that the anchor and cable were to be supplied on his own account, and not for the use of the ship, it would clearly be a sufficient defence to the claim which is now advanced by the material men. For what

is the principle upon which the owner of a ship is made [ \*356 ] responsible for necessities furnished to the ship by order of the master? it is this, that in the employment of the ship the master is the agent of the owner, and his character and situation furnish a presumption that he has authority from the owner to take all measures that may be necessary for rendering the employment of the vessel efficient and beneficial to his employer.

But if the tradesmen or material men are distinctly informed that the articles ordered are not for the use of the ship, but for the account and on the credit of the master only, the whole legal hypotheses upon which the liability of the owner depends is gone. In law, therefore, the first defence that is set up against the demand of the plaintiff in this suit is well founded if it be supported in fact. Upon the facts of the case, then, how does the matter rest? Now, looking to the facts, I must observe, *à priori*, the statement set up is not very consistent with probability,—it is not very probable, although it might be possible, that an anchor or cable should have been taken by the master of this vessel as an article of mere merchandise; and it is still less probable that the material man in this country should have trusted a foreign master disclaiming the liability of his owners, and assist his private speculation in such articles of merchandise.

But if such a transaction be *à priori* improbable, the improbability is still further increased by a reference to the very first document in the cause, namely, the account rendered at the time by the material men, of which a copy is annexed to Mr. Mitchelson's affidavit. The account so rendered is made out against the owner, and is signed by Sorenson himself, the master of the vessel. Now if the own- [ \*357 ] er's version of the transactions be true, Messrs. \* Mitchelson were guilty of what may be termed a fraud, for having given

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The *Alexander*. 1 W. Rob.

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credit to the master solely, they would now seek to charge the owner with the debt, against all conscience and fair dealing. This is not hastily to be presumed, and it cannot escape the observation of the court, that although the master of this vessel was a foreigner, he would not have been so incautious as to sign a document, which, according to his present account, was the very reverse of the truth.

It has been argued by the counsel for the owner of *The Alexander*, that it is not to be inferred necessarily from the document in question that the owner of that vessel was to be solely charged; but this is immaterial to the decision in the case, for in law both the owner and the master may be responsible, not jointly, but severally, and the material man may bring his action against either of them. The next document is the letter addressed to Captain Sorenson, the then master, upon the 5th of May, 1837, by the Messrs. Mitchelson, calling upon the master for payment. It is in these words: "We have been for a long time past expecting a remittance from you, for the amount of anchor and chain supplied in July, 1835, two years since; amount 46*l.* 13*s.* 0*d.* If not immediately paid we shall be obliged to send the account to our agent in Norway to recover the same," &c. This document has been much relied on by the owner in support of his statement, but in my opinion, *per se*, it goes very little way, and for the reason I have already stated, namely, that the master was liable to the articles supplied as well as the owner. But contrasting this document with the account itself, I think it is impossible to conclude, from the perusal of its contents, that credit \* was [ \* 358 ] given personally to the master, without any reference to the owner. With respect to the letter bearing date the 10th of November, 1840, addressed by the owner to Messrs. Mitchelson, it is to be observed, that it is a mere disclaimer on the part of the owner, and whether it be true or false it cannot affect the case, inasmuch as the liability of the owner does not depend upon anything he may have done since, but upon what was actually done at the time when the anchor and cable were supplied. With a similar observation I may dismiss the memorandum or indorsement of the master. A bankrupt assuming a debt in exoneration of his brother-in-law is no evidence upon which any court could rely, and this, too, five years after the transaction had occurred. Upon the documentary evidence then which is before the court I am perfectly satisfied that it does not support the first ground of defence which is put forward by the owner of this vessel.

What then is the evidence upon the affidavits which have been introduced by the owner in support of this part of his case. In the first place there is the affidavit of Mr. Burchardt, the owner himself,

but this evidence does not materially advance the case, for the concealment of the master from his employer as to the purchase of the anchor and cable cannot affect the question to whom credit was given. The same observation applies to the affidavits of Sprone, the boatswain, and Larsen, the mate, both of whom depose to the belief that the anchor and cable were carried out in a subsequent voyage and disposed of by Sorenson, the master, in the port of Havre-de-Grace. The mate, it is true, also swears to an understanding on his part that they were purchased for the master's own account [ \* 359 ] and use, but \* this is no evidence of the fact itself, whether they were so purchased or not. Lastly, there is the affidavit of Sorenson, the former master; and if his evidence stood wholly uncontradicted, it might go far to establish the defence set up, but look at the evidence on the other side.

Mr. Mitchelson, sen., in his affidavit says, "that repeated applications for payment have been made, not only to Burchardt, the owner of the said vessel, but also to Abraham Sorenson, his brother-in law, as agent for the said owner, &c., &c." The second affidavit, sworn to by Mitchelson, jun., directly contradicts Sorenson, the master, and also the statement set forth in the reply to the act on petition, "that when Sorenson, her then master, purchased the anchor and cable and other articles set forth in the account, he informed the said M. the younger, that the same were not for the use of the ship. This contradiction is confirmed by a further affidavit of Forbes, the clerk in the service of the Messrs. Mitchelsons at the time the articles were purchased, and who expressly swears that the said S., the master, when he called at the counting-house of Messrs. M. for the purpose of obtaining the account, was referred to the deponent, and that he expressly admitted to the deponent that the said articles had been supplied for the use of the ship, and were chargeable against the owner thereof." Under these circumstances it is impossible to doubt the conclusion to which the court must come. In support of the owner's version of the transaction there is the evidence of the former master alone, whilst on the other side the statement of the material men is borne out by the probability of the transaction itself, [ \* 360 ] the documentary evidence in the cause, and the \* testimony of three witnesses, whose credit or veracity is in no degree subject to impeachment. I am therefore clearly of opinion that, upon the first ground of defence set up by the owner of this vessel against the demand of the material men, there is a complete failure of proof in the present instance.

The second defence set up by the owner now remains to be considered, namely, that the anchor and cable were unnecessarily supplied

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The *Alexander*. 1 W. Rob.

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under the circumstances of the case; and in approaching this part of the question I greatly regret that in the rejoinder of the material men no notice should have been taken of the averment upon this point, distinctly set forth by the owner in his reply to the act on petition. The denial of the necessity is altogether unnoticed in the rejoinder, as if it were wholly immaterial; whereas, in my opinion, it is a most important averment, involving a grave question of law; and here I may observe that when the recent statute conferred upon this court a jurisdiction in these matters, or rather perhaps revived an ancient jurisdiction long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar cases of foreign ships, and which is confined to that necessity. I will state in one sentence what I apprehend to be the condition necessarily imposed upon the court. It is this: that the court must not make the owners of a foreign ship liable for the supply of any articles for which, under similar circumstances, if resident here, they would not be responsible in a court of common law.

I believe that upon this subject there is no real distinction between that law and the law maritime. In common parlance it is said that the owners shall \* be responsible for necessaries [ \* 361 ] furnished to the ship; but if an erroneous meaning be put upon the word necessaries, great confusion will ensue. In one sense an anchor and cable is a necessary, for a ship cannot sail in safety without them; but it does not therefore follow that at all times, or at any particular time, a new anchor and cable, or several, are necessary for the use of a ship. It is not sufficient to say that they are necessaries, but they must be necessary at the time and under existing circumstances in the sense that the law requires. In order to ascertain the strict legal acceptation of the term necessary, I must now advert to the authority of reported cases upon the point. The first authority is the case of *Webster v. Seekamp*, 4 B. & Ald. 352. The case was an action of *assumpsit*, brought by the plaintiffs, who were brass founders at Liverpool, to recover the amount of their bill for coppering a ship, of which the defendants, who resided at Ipswich, were owners. In September, 1839, the vessel was at Liverpool, bound on a voyage to Newfoundland and the Mediterranean; the captain of the ship ordered the plaintiffs to copper her; and it was proved that, although it was extremely useful to copper vessels bound to the Mediterranean, it was not absolutely necessary, for many vessels went there without being coppered. At the trial of the case, before Best, J., at the London sittings before Michaelmas term, it was contended that the owner of a ship was liable only for contracts made by the captain in respect of stores or repairs that were absolutely necessary,



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The *Alexander*. 1 W. Rob.

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and therefore that the defendants were not liable. The learned judge left it to the jury to say whether the coppering was useful and proper for a vessel about to proceed on a voyage to Newfoundland [ \* 362 ] and the Mediterranean, \* and whether it were such as a prudent owner himself would have ordered, if present. The jury found that it was, and the plaintiffs obtained a verdict. A new trial was moved for, and a rule *nisi* having been obtained, in Michaelmas term the rule was argued, when Lord Chief Justice Abbot, in delivering the judgment of the court, observed to the following effect: — “The general rule is, that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and impossible in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term ‘necessary,’ as applied to those repairs done, or things provided for the ship by order of the master, for which the owners are liable.” He was, therefore, of opinion that the case had been properly left to the jury, and that the rule ought to be discharged. Mr. Justice Bayley was of the same opinion; so also was Mr. Justice Best, who expressed himself in these words: — “The mode of ascertaining what repairs are proper or necessary, is to ask what a prudent owner himself would do if present. The case of *Carey v. White* is very distinguishable from the present, for [ \* 363 ] \* there money was supplied to the captain, and he had the opportunity of applying it to any purpose which he thought proper, which is a very different case from that of necessary repairs done to a ship.”

The principle which I extract from this case is very clearly laid down, and is also simple, just, and consonant with the interests of all parties, such principle being, in the words of Mr. Justice Best, “what a prudent man would do if he were present.”

The case of *Webster v. Seekamp*, to which I have thus far adverted, it must be noticed, applies more immediately to repairs and articles furnished, and is not directly applicable to an advance of money alone. Upon the latter point, however, two authorities are to be met with in Lord Chief Justice Abbot’s treatise on Shipping, and

the result of those authorities, in the words of that learned judge, is stated to the following effect. In page 116, he says, "that in order to constitute a demand against the owners, it is necessary that the supplies furnished by the master's orders should be reasonably fit and proper for the occasion, or that money advanced to him for the purchase of them should at the time appear to be wanting for that purpose. The contrary, in either case, would furnish a strong presumption of fraud and collusion on the part of the creditors." Again, after stating at considerable length the case of *Carey v. White*, he concludes with the following observations:—"This case, whilst it establishes the principle of the personal responsibility of the owners, shows also that the creditor is required to prove the actual existence of the necessity of those things which give rise to his demand. The authority of the master is to provide necessaries; if, therefore, \* a person trusts him for things not necessaries, he [ \* 364 ] trusts him for that which it is not within the scope of his authority to provide, and consequently has no right to call upon his principal for payment. In the words of Lord Ellenborough, "the money supplied must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties or other necessary purposes." Many other cases may also be cited, in which this principle is illustrated at great length, but it is not necessary for me to go through them minutely. There is the case of *Robinson v. Lyall*, reported in the seventh volume of Price's Reports, p. 592, in which case the action was brought to recover a sum of money furnished to the master by a ship chandler at Portsmouth, to pay seamen's wages and other debts contracted by the master for necessaries for the use of the ship whilst in the port of Portsmouth, and the Court of Exchequer held that, so far as the money was proved to have been advanced necessarily, the owners were liable. I have also referred to the case of *Rocher v. Busher*, 1 Starkie, p. 27, in which case the judgment of Lord Ellenborough contains a repetition of the doctrine laid down by Lord Tenterden. "In strictness," he says, "a claim of this kind is limited to articles supplied through necessity; but where the same necessity exists, money may be supplied as well as goods, and the amount recovered, &c." That was a case of money advanced, as was also the case of *Palmer v. Gooch*.<sup>1</sup> The effect of these cases is exactly the same, namely, that the money \* advanced must be proved to be strictly necessary for the [ \* 365 ] use and service of the ship.

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<sup>1</sup> 2 Starkie, 428.

What, then, is the distinction laid down by the learned judges between the two cases of repairs and necessities furnished and money advanced? In both cases I apprehend that it is equally incumbent upon the party setting up the claim to establish the existence of a necessity; the only difference is in the extent of the proof required. In following out authorities, I have looked to see what is the opinion of a very learned writer upon American law, and, in his treatise upon Principal and Agent, Mr. Justice Story expresses himself in the following terms: "The authority of the master as to the repairs of a ship, even in a foreign port, is limited to necessary repairs, by which we are not to understand such repairs only as are indispensable for the safety of a ship or the prosecution of the voyage, but such as are reasonably necessary under the circumstances of the case." The doctrine thus laid down in no degree militates against our own legal authorities. The only case which has come to my knowledge in which a contrary doctrine appears is the case of *Craigie v. Ogilvy and Izitt*, which was decided in Scotland in the year 1807, whilst the Admiralty Court in that country existed. In that case, the owners of *The Olive Branch* were sued by a ship-master in Montrose, who, at a port in Norway, had furnished at the desire of the master of *The Olive Branch*, a cable of the value of 36*l*. The defence to the action was that no cable was necessary, and the question was raised, whether necessity must be proved in such a case. In deciding the case the judge admiral recognized a distinction between the furnishing of naval stores and the loan of money; \*holding it requisite, in the latter case, only to look to the necessity. He also recognized a distinction between articles of ordinary use and necessary to the vessel's safety, and articles manifestly superfluous and mere luxuries, as a Turkey carpet, *exempli gratia*, for the cabin. He repelled the defences, reserving all question between the owner and the ship-master. Now so far as the case of *Craigie v. Ogilvy* would have any operation, it would tend to establish a distinction between the supply of necessities for the ship and the advance of money, but that case is wholly unsupported, and although, to a certain extent, founded in good sense, I cannot allow the decision to have any weight against a whole current of higher authorities in the English law. To this extent I agree with the decision in the case of *Craigie v. Ogilvy*, that in the case of an anchor and cable supplied to a vessel, a less degree of evidence might suffice to prove the existence of a necessity than would be required in the case of a loan of money, but I cannot divest myself of the conviction that some evidence is necessary. The principle of law, in casting the *onus probandi* upon the plaintiff, is founded upon great and important princi-

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The *Alexander*. 1 W. Rob.

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ples of justice, and the rules resulting therefrom are framed with wisdom to remedy great abuses. To charge one man for articles supplied to another is, *primâ facie*, contrary to natural law. But when such party is trusted by the party charged, and where the relation of agent and principal is constituted, it is perfectly reasonable to affix the responsibility upon the principal,\* more especially when such responsibility is restricted by requiring the creditor to use proper diligence in ascertaining that the articles supplied were necessary, and such \* as the owner himself, if present, would have [ \* 367 ] ordered. Do the facts of the present case then bring the plaintiffs within the rules and principles that have been thus laid down? The material men have contented themselves with simply stating the nature of the articles supplied, and the defence that has been set up by the owner has been wholly uncontradicted by any evidence on behalf of the material men. Although it would have been difficult, at the present moment, for the material men to have supplied evidence as to the precise state and condition of the vessel when the articles in question were supplied, there would have been no difficulty to have proved by evidence of persons acquainted with nautical affairs and engaged in voyages of this description, that a third anchor and cable were articles such as a prudent owner would have sanctioned. No such evidence is produced in the present instance, and although some suggestions have been thrown out by the counsel for the material men in arguing the case, that in causes of salvage intimations have been made by the court as to the propriety of vessels being furnished with three anchors, I cannot, in the absence of all evidence upon the point, take upon myself to determine what is the proper number of anchors and cables which ought to have been on board this vessel under the circumstances of the present case.

What then is the conclusion to which I must come?

In the first place, I must observe that the *onus probandi* rests with the plaintiffs, and such *onus* has been altogether deserted in the present instance. Upon the other side, it is distinctly sworn in the affidavits of the master, the mate, and seamen on board the vessel, that she was supplied with the \*proper number of [ \* 368 ] anchors and cables, and that the articles in question were of no service and were never used.

I am, therefore, of opinion that I am bound to pronounce that the plaintiff has failed in the proof of his case, and that the owner in Norway has established his defence, and this to the fullest possible extent, inasmuch as he has proved the negative when the plaintiffs were bound to prove the affirmative. Under these circumstances, I

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The Sophie. 1 W. Rob.

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must accompany my decision with the costs, but these must be limited to the present suit. With respect to the former protest each party must pay their own costs.

THE SOPHIE,<sup>1</sup> Gustavus.

March 16, 1842.

Under the term "necessaries supplied to a foreign ship," the advance of money may be included so as to bring the case within the provisions of the statute 3d & 4th Victoria.

The court, however, must be satisfied that the necessaries were wanting, and that the money was *bonâ fide* advanced for the purpose of procuring them.

A motion for a *primum decretum* for the sale of a foreign ship, where money had been advanced to the master, who was also a part owner, directed to stand over until an affidavit should be brought in, stating that the money was advanced for the necessary purposes of the ship.

In this case, The Sophie, a foreign vessel,<sup>2</sup> having encountered damage in proceeding from the port of Liverpool on her homeward voyage, the master, who was also part owner, was compelled to put back to Liverpool for repairs; being without funds, he applied to a mercantile firm in Liverpool for assistance, and advances were made amounting to the sum of 133*l*. The vessel was subsequently arrested, and, no bail being given, the usual defaults were granted, and the court was now moved by the Queen's Advocate to sign the *primum decretum*. In the account brought in by the parties, by whom the advances were made, it appeared that some of the items were for money advanced to the master personally for the service of the ship.

[ \*369 ]      \* PER CURIAM.

I have observed, in a recent case,<sup>3</sup> and I wish it to be distinctly understood, that in all these cases I never can make a ship responsible for advances and supplies for which the owner himself, if he were in this country, would not be responsible. It is absolutely necessary, when the owner is abroad, to prove not only that the articles supplied were necessaries, but that they were actually wanting for the service of the ship at the time when they were made. The

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<sup>1</sup> [S. C. 1 Notes of Cases, 393.]

<sup>2</sup> *Vide* the case of The Sophie, *ante*, p. 326.

<sup>3</sup> *Vide* The Alexander, *ante*, p. 360.

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The Gipseý. 1 W. Rob.

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technical meaning of the term necessities, I have already explained, as strictly applying to anchors, cables, rigging, and matters of that description; at the same time, I consider myself at liberty to enlarge the term necessities so as to include money expended upon necessities; but, in such cases, I must be satisfied that the necessities were wanting, and that the money was *bonâ fide* advanced for the purpose of procuring them. In the present case, no difficulty occurs with respect to the greater portion of the advances specified in the account of the master, who is also the owner of the vessel, having made himself personally responsible by giving the order. A difficulty, however, does arise with respect to the money which is stated to have been advanced, because it constitutes a claim in the nature of a debt; and although the owner may be liable at law, it never could have been the intention of the legislature, in passing the act 3 & 4 Vict., to give to this court a jurisdiction to make the ship responsible for a common debt. I must, therefore, require a further affidavit to be made, stating that the money was advanced for the necessary purposes of the ship, before I sign this decree.

\* On a subsequent day an affidavit was brought in to this [ \* 370 ] effect, and the court signed the *primum decretum*.

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THE GIPSEY.

March 16, 1842.

In proceedings in the Court of Admiralty, when interrogatories are put into the hands of the examiner, and no notice is given at the time of any intention to administer additional interrogatories, the examiner is not bound to detain the witness for twenty-four hours after his examination is completed.

Application to have a witness reproduced who had left London for Liverpool immediately upon the completion of his examination, refused.

IN this case a witness was produced and interrogatories were delivered to the examiner, no notice being given to the examiner that further interrogatories were intended to be administered. The witness left London for Liverpool immediately upon the completion of his examination by the examiner. The proctor for the party administering the interrogatories applied to have the witness reproduced for the purpose of administering further interrogatories, upon the ground that he should have been kept in London for twenty-four hours after his examination, within which time the further interrogatories had been tendered.

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The Massachusetts. 1 W. Rob.

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PER CURIAM.

I am not aware of any rule in this court, that when interrogatories are put into the hands of the examiner, and no notice is given at the time of any intention to administer additional interrogatories, the examiner is bound to detain the witness for twenty-four hours after his examination is completed. I shall make no order for the reproduction of this witness, and if the party making the application wishes to examine him, he must bring him up at his own expense.

[ \* 371 ]

\* THE MASSACHUSETTS, Pritchard.

April 19, 1842.

Collision occasioned by the dragging of the anchor of the damaging vessel, the anchor being too light to hold the ship.

The owners of the damaging ship not exempted from responsibility by the fact of having a licensed pilot on board at the time, under the provisions of the statute of 6 Geo. IV.

Damage pronounced for.

THIS was a cause of collision promoted by the owners of *The Bullfinch*, under the circumstances fully noticed in the observations of the court. The court was assisted by Trinity Masters.

For the owners of *The Bullfinch*, *Haggard*.

*Addams, contra*.

DR. LUSHINGTON, addressing Trinity Masters. It is incumbent upon me to trouble you with a few observations, as the ultimate decision of this case must depend on the consideration of all the circumstances. There is, I lament to say, great discrepancy in the evidence, but I rely upon your assistance for the explanation of the nautical probabilities, in order to arrive at a sound conclusion. The facts themselves lie in a narrow compass. The statement of the party proceeding in the cause is this:—That having dropped down the river with the tide, *The Bullfinch* was at anchor or was in the act of anchoring, off Pitcher's Point, when *The Massachusetts*, a brig of 300 tons, was seen coming up the river in tow of a steamer; that the steamer cast her off, as she attempted to come to an anchor, but the anchor not holding she drove against the bows of *The Bullfinch* and occasioned the damage in question. It is also further stated, that when the two vessels were entangled together, the master of *The Bullfinch* called out to the master of the brig to cut away a lanyard, which he refused

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The Massachusetts. 1 W. Rob.

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to do, or to permit any other person to do so. This is the statement of The Bullfinch. On the other hand, the statement of The Massachusetts is, that so far from The Bullfinch being at anchor at the time, she was driving athwart the tide and ran \* against [ \* 372 ] The Massachusetts, which they admit was endeavoring to come to an anchor; in point of fact, they endeavor to shift the blame from themselves and to fix it upon The Bullfinch. You will have to consider which of these conflicting statements is entitled to credit. If you shall be of opinion that The Bullfinch was at anchor or anchoring, then you will have to consider whether sufficient and ample notice was given to the persons on board The Massachusetts so as to have avoided the accident if properly piloted; because, if The Massachusetts was under the command of a pilot, and did every thing which was right and incumbent upon her to do, and yet the anchor was so light that it would not hold, the blame will then attach upon the owners of The Massachusetts, and they will be liable for the damage. I will now state the points to which your attention must be specially directed. Three causes are assigned by The Bullfinch as having occasioned the accident in question:—

1st. That The Massachusetts did not come to an anchor so soon as she ought to have done, seeing The Bullfinch at anchor or anchoring.

2d. That the anchor was too light to hold the ship, and that sufficient length of chain was not laid out.

3d. That the extent of the damage was materially increased by the refusal of the master of the brig to cut away the lanyard.

With respect to the evidence as to the cutting away the lanyard it is sworn, that three persons on board the bark called out, "Cut away the lanyard," but nothing was done in consequence. That one of the brig's crew, who was about to take measures to cut it, was prevented by the master of The \* Massachusetts. [ \* 373 ] Although the particular individual is absent, and has not been examined, there is, nevertheless, the evidence of three witnesses upon this part of the case who are trustworthy persons, and to be believed, unless contradicted by opposing evidence. It is unnecessary to pursue the inquiry how far the statement of these witnesses has been met on the other side; for this reason, that the fact, whether or not the master of The Massachusetts was hailed to cut the lanyard, is not important to the consideration of the present question. The point for you to consider is this, whether, under the circumstances of the case, the master of The Massachusetts ought not, whether it was suggested to him or not, to have given the directions himself. The brig was not under the orders of the pilot for this purpose, she was



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The Athol. 1 W. Rob.

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only under the pilot's directions for the purpose of navigation; and the master, in a case of this description, is not to wait for the pilot's directions, which would tend to create great confusion and delay.

If you are of opinion that the accident arose partly from the fault of the pilot in not coming to an anchor in sufficient time, and partly from the defective weight of the anchor, the legal consequence is, that the damage having arisen from the joint default of the pilot and the owners, the responsibility of the loss must fall upon the owners of the ship.

Lastly, if looking to the facts of the case you shall disbelieve the account of The Bullfinch, and shall be of opinion that she was not at anchor or anchoring, but driving athwart the tide as stated by The Massachusetts, you will take this circumstance into your [ \* 374 ] consideration, and give me the \* benefit of your opinion as to its effects upon the merits of the present question.

The Trinity Masters were of opinion that The Bullfinch was at anchor, and that the accident arose from the fact, that the anchor of The Massachusetts did not hold.

Damage pronounced for, with costs.

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### THE ATHOL, Bellamy.

April 19, 1842.

Public officers of the crown are not bound to appear at the suit of private individuals when the interests of the crown are concerned.

Monition refused against the Lords Commissioners of the Admiralty to answer in a suit for damage by collision, occasioned to a British vessel in the English Channel by H. M. troop-ship Athol.

This was an application to the court to decree a monition to issue against the Lords Commissioners of the Admiralty under the following circumstances:—

Upon the 7th of March last the brig Jane Clark, belonging to the British Shipping Company, whilst on a voyage from Newcastle to Naples, was run down in the English Channel by H. M. troop-ship Athol, and was totally lost. A memorial having been presented to the Lords of the Admiralty, praying compensation, or otherwise that the admiralty proctor might be instructed to appear to answer a suit to be commenced in this court, a letter was addressed to the proctor

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The Athol. 1 W. Rob.

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and owners by the Secretary of the Admiralty, stating that the Lords Commissioners of the Admiralty declined to interfere.

A motion was now made for a monition against the Lords of the Admiralty, calling upon them to show cause why the damage should not be pronounced for, and compensation awarded to the owners of the ship and cargo, and to the master and crew for the loss of their effects.

*Addams*, in support of the motion, after reading \* the let- [\* 375 ]  
ter of the Secretary of the Admiralty, observed — That the answer which had been returned to the owners' memorial was a somewhat singular communication, being to the effect following, namely, "That the Lords of the Admiralty, who, *pro hac vice*, stood in the place of the owners of The Athol, were satisfied that the accident occurred partly from the darkness of the night, and partly from the want of a good look-out on board The Jane Clark, and consequently that no further investigation was necessary." That such answer was, in point of fact, a mere echo of the every day reply set up in this court by the owners of vessels proceeded against in causes of damage by collision — that the disinclination which it evinced to submit the case to the adjudication of the court was not a very candid or commendable mode of dealing with the matter in question, inasmuch as proceedings were by no means uncommon in the Court of Admiralty on behalf of king's ships when ran against by the vessels of private individuals, and in a case which occurred as recently as Michaelmas term last, an action was prosecuted and damages were recovered in this court by the crown, against a vessel belonging to the Commercial Steam-Packet Company, which had ran foul of H. M. steam-vessel Lightning, in Woolwich Reach. That it might possibly be objected to the application, that the court would find a difficulty in enforcing its monition if granted. The answer to this objection was, that no greater difficulty was to be apprehended in executing the process if issued than had been experienced in former cases, where similar applications had been granted by the court. That in the case of The Maria a monition \* was taken out [\* 376 ] against the lords commissioners of the navy, and in the practice of the prize courts a variety of instances might be mentioned in which appearances had been directed to be given by the lords commissioners of the treasury. Lastly, that in the recent case of The Duke of Sussex (the case referred to) the amount of the damages sued for and recovered by the crown did not exceed the sum of 30*l.*, whilst the loss which had been incurred by the owners of The Jane Clark in the present instance was stated to amount to between 2,000*l.* and

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The Athol. 1 W. Rob.

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3,000*l*. That the facility for recovering the damage in both instances should at least be reciprocal. And it would be contrary to all justice that proceedings to the full extent should be allowed to be carried on in this court, for the purpose of recovering a comparatively trivial sum from private individuals, when they were the wrong-doers, against the crown, and that the owners of *The Jane Clark* should be debarred *in limine* from the prosecution of their redress in this case when the tort had been committed by the servants of the crown, and the damage occasioned was so much greater in amount.

*Elphinstone*, on the same side. Admitting that no direct precedents were to be found in which a monition of this kind had been directed against the Lords of the Admiralty, the absence of such precedents, so far from being unfavorable to the present application, suggested this favorable inference, namely, that no instances had heretofore occurred in which the admiralty had refused to grant a recompense in cases of this kind, where a compensation was justly due. That in the [ \* 377 ] practice of the court many analogous cases might \* be cited, in which the principle had been recognized in favor of the court's authority to direct the monition to issue as prayed, namely, the case of *The Swift*, 1 Dodson, 222; *Mentor*, 1 Robinson, 179; *Acteon*, Edwards. Other analogous cases might also be found in which the principle had been adopted in the practice of the common law courts, as in the cases of custom and excise officers exceeding their authority, in both of which cases an action of trespass would lie; also in the cases in which a *mandamus* had been granted against the lords of the treasury for payment of salaries.

*Queen's Advocate* and *Phillimore*, *contra*. That in resisting the motion, it was not to be supposed that the crown or the high law functionaries to whom its authority in admiralty affairs had been delegated, were desirous of interposing any obstruction to the furtherance of justice. At the same time, it was to be observed that the owners of *The Jane Clark* had entirely mistaken their way in making the application which they had thought fit to prefer upon the present occasion. The proper course to have been adopted was by a proceeding against the person in command of the troop-ship, the alleged actual wrong-doer. That as against the crown, or vessels the property of the crown, the court had no jurisdiction under the principles laid down by Lord Stowell in the case of *The Cornus*, cited by Sir C. Robinson in arguing the case of *The Prince Frederic*. 2 Dodson. That the principle upon which the Lords of the Admiralty had considered themselves bound to refuse an appearance in

this case was stated by them in their letter to the proctor of the admiralty to this effect: "That public officers, \* being [ \* 378 ] merely servants to her Majesty, cannot be made personally liable in suits for claims which the subject may allege to have upon the crown." Of the truth of this position no rational doubt could be entertained, it being well founded both upon principle and the authority of decided cases. That no precedent had been cited on the other side in point with the present case; indeed it had been admitted that none could be found in which a monition of this kind had been issued. It had been said however that analogous cases had occurred, and in support of the assertion, a variety of authorities had been referred to. The learned counsel then proceeded to show that the authorities cited were not in point, and in conclusion submitted that even in cases where the crown might be held to be the actual wrong-doer, the proper and legitimate mode of proceeding, as pointed out by Mr. Justice Blackstone, was by a memorial addressed to the crown in the first instance, containing the true state of the matter in dispute. When that course is pursued, in the words of Mr. Justice Blackstone, the law "presumes that to know of any injury and redress it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved." Black. Com., lib. iii. c. 17.

## PER CURIAM.

DR. LUSHINGTON. An application is made in this case for a monition to issue against the Lords Commissioners of the Admiralty, calling upon them to appear in this court in a cause of damage which it is alleged that the owners of The Jane Clark have sustained in the running down of their vessel by a ship belonging to the crown, or which, at the time the accident occurred, \* was engaged [ \* 379 ] in the service and employment of her Majesty.

Now the first consideration which occurs is this: namely, how far could I enforce the execution of the process if it should be granted and resisted. This is an important point to be considered in the first instance in all cases of this kind, inasmuch as it would, I conceive, be a very imprudent and scarcely a befitting attempt in any court to issue a process which it could not enforce, and which, if resisted, must terminate in a defeat of the authority of the court. In applying this consideration to the present case the following difficulties suggest themselves as conclusive of the question which I am now called upon to determine. In the first place, I feel that I could not enforce the monition if the Lords of the Admiralty should refuse to appear; and secondly, assuming that an appearance should be given on their

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The Athol. 1 W. Rob.

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behalf, and it should be found that the damage in question was occasioned by the fault of the troop-ship, *The Athol*, or those on board her, I could not enforce the payment of that damage as against the Lords of the Admiralty under the circumstances of this case. But there are also other considerations which induce me to refuse this application. As far as my own experience extends in the practice of the court, I am not aware of any case in which a similar process has been issued; on the contrary, in a case which was decided by Lord Stowell, and which is the only case that I can recollect in any degree approaching to the circumstances of this case, Lord Stowell expressly declined to issue any monition, upon the ground that "he was satisfied that the Lords Commissioners of the Admiralty would be disposed to do justice upon being convinced that wrong

[ \*380 ] \* had been done, and that the occurrence complained of had actually taken place." It has been urged in the argument of the counsel for the owners of *The Jane Clark*, that appearances have been given for the crown in this court, and in other jurisdictions in a variety of analogous cases. Now, looking to the cases which have been cited, it appears to me that they have no bearing upon the point in question in the present case. The case of *The Swift*, reported in the first volume of Dodson, p. 322, is a totally distinct and different case. In that case an officer of the customs at Jamaica had seized a vessel for breach of the navigation laws. The vessel had a cargo on board at the time, and the crown appeared and claimed the cargo, which consisted of certain stores for the use of her Majesty's forces at Jamaica. It was not disputed that the officer had a right to seize under the statute, but it was contended that the statute did not apply to the case then under consideration. Again, in cases of king's ships loaded with cargo or treasure, salvage has been awarded, but no case has occurred within my recollection in which the crown alone has been concerned. With respect to proceedings in the prize courts, they are subject to a different consideration from proceedings in the Instance Court of Admiralty. The cases which have been cited moreover would operate against the present motion; for instance, in the case of *The Mentor*, in which an attempt was made to render Admiral Digby responsible for the destruction of an American vessel by two ships which formed part of his squadron, after hostilities had ceased between this country and America, the court dismissed the suit upon the ground that he was not responsible

[ \*381 ] as the mere admiral of the \* station, not being privy to the fact. The observations of Lord Stowell, in delivering his judgment in that case, were to the following effect: "The actual wrong-doer is the man to answer in judgment — to him responsibility

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The Athol. 1 W. Rob.

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is attached in this court; he may have other persons responsible to him, and that responsibility may be enforced. As, for instance, if a captain made a wrong seizure, under the express orders of an admiral, that admiral may be made answerable in the damages occasioned to the captain by that improper act; but it is the constant practice of this court to have the actual wrong-doer, the party before the court, and every man must see the propriety of that practice."

The result of Lord Stowell's decision, therefore, in the case of *The Mentor*, and the observations which fell from that very learned judge in delivering his judgment, directly affirms the principle that, in case of tort or damage committed by vessels of the crown, the legal responsibility attaches to the actual wrong-doer, and the injured party must seek his redress, not against the parties who may be indirectly involved in the transaction, but from the person who immediately commits the injury. The same principle is borne out by the decisions of the courts of common law; and I recollect a case where damages were recovered against an officer in command of one of her Majesty's ships of war, who had unjustly seized a ship in time of peace, and the officer was obliged to fly the country. It may also be noticed that cases are to be found in the reported decisions of the courts of common law, in which the principle has been recently established that public officers are not bound to appear, when the interest of the crown is concerned.

\* I allude to the case of *Gidley v. Palmerston*, where an [\* 382] action was brought against Lord Palmerston, when secretary of war; and the case of General Palmer against the Postmaster-General, arising out of a contract for the supply of mail coaches. With respect to the analogy which it has been attempted to draw between this case and the cases where applications have been made to the Court of Queen's Bench for a *mandamus* to the lords of the treasury, for the payment of salaries, it is to be observed that these cases are solely and entirely founded upon particular acts of parliament.

Under the circumstances of this case, then, both upon principle and the authority of decided cases, I must decline to issue the monition as prayed. At the same time, sitting here as a judge in a court of justice, I am bound to express the opinion that I cannot apprehend the high personages who represent her Majesty in her office of admiralty, will avoid doing justice, or that, upon a due consideration, they will take upon themselves to say that they will be themselves the exclusive judges upon the merits of the present case. Whether they shall appear or not, is not a matter for this court to determine. I decline to grant the monition.

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The Volant. 1 W. Rob.

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On application by the proctor for the owner of The Athol, the court directed that a communication should be made by the register to the Lords of the Admiralty, stating that the present motion had been made to the court; and the Lords of the Admiralty subsequently directed that an appearance should be given by the admiralty proctor for The Athol, in order that the court might adjudicate upon the question.

[ \* 383 ] \* Upon the 23d of July, the cause was heard before Trinity Masters, when The Athol was pronounced to have been in fault, and the damages and costs were pronounced for.

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THE VOLANT, Merchant.

April 19, 1842.

Application for security for costs should be made in the earliest stage of the proceedings.

In ordinary cases the court will enforce this rule.

Under the circumstances of the case, security for costs decreed after the act on petition had been concluded, and both proctors assigned to bring in their proofs.

A part owner who was on board, and in command of the damaging vessel at the time of the collision, held not responsible for the excess of damage beyond the proceeds of the ship.

In order to render a master, part owner, responsible beyond the value of the ship and freight, he must be sued as master in the first instance, and in the proceedings he must be personally charged with being the cause of the damage, by his misconduct, and that cannot be done directly or indirectly in another suit.

IN this case an action was brought against this ship on behalf of the owner of the brig Beatitude, in a cause of damage by collision.

The action was entered in the sum of 2,200*l.*, and bail was given for The Volant in 825*l.*, the amount of the agreed value of the ship only (under the stat. 53 Geo. III. c. 159, s. 1.) A cross-action was also entered on behalf of the owner of The Volant against The Beatitude, and bail having been given in the sum of 250*l.*, the cause proceeded by an act on petition, which was concluded on the bye day of Hilary term, and both proctors were assigned to bring in their proofs upon this court day.

A motion was now made by the owner of The Volant, that the proctor for The Beatitude might be compelled to give security for the costs of both actions, upon the ground that the owner of The Beatitude was resident abroad, and that the original action had been entered in his name, without his knowledge or authority.

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The Volant. I W. Rob.

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The motion was opposed by *Addams*, for the owner of The Beatitude, submitting that the application should have been made earlier, and that it was contrary to the practice of the court to grant it in this stage of the proceedings; that in the courts of common law it would be inadmissible, and its rejection in the present instance would be \*attended with no detriment or prejudice, [ \*384 ] inasmuch as security had been already given in one of the actions on behalf of the owners of The Beatitude. To this it was replied that the security given would not cover the costs for which the present application was made.

PER CURIAM.

According to the practice of other courts, it is, I apprehend, the usual course, that applications of this kind should be made in the earliest stage of the proceedings; and, in ordinary cases, I should be disposed to enforce the observance of the same rule in the proceedings in this court. There is, however, this peculiarity in the present case, that the owner of The Beatitude is resident abroad, and the original action was entered by another person, in his name and without his privity and concurrence. If I had been aware of this circumstance at the time, I should have directed security for the costs to be given in the first instance; and as I am now informed that the bail which has been given will not be liable for the costs for which this application is made, I shall direct security to be given for the same, before I allow the suit to proceed. The amount of that security I fix at 80*l*.

Upon the 3d of June, the case was heard upon its merits, when the court, assisted by Trinity Masters, pronounced for the damage sued for.

*Addams*, for the owners of The Beatitude, moved the court to have the decree taken down not only against the vessel, the value of which was wholly insufficient to cover the amount of the damage in question, but also against the master, who was a part owner in \* The Volant; and, in support of his motion, he cited the [ \*385 ] case of The Triune, Haggard, vol. 3, Part I, p. 114.

*Queen's Advocate*, *contra*, cited The Hope. *Vide supra*, vol. 1, Part I, p. 158.

● *Cur. adv. vult.*



Upon a subsequent day the court delivered its opinion to the following effect:—

#### JUDGMENT.

DR. LUSHINGTON. The question to be decided in this case is of considerable importance, and is attended with some difficulty. It arises under the following circumstances: an action for damages having been entered in the sum of 2,200*l.*, a warrant of arrest was extracted, and was duly executed upon the vessel; an appearance was entered for the owners, and bail was given in the amount of 825*l.*, the ship being alleged to be of that value, and so admitted by the party proceeding in the action. When the cause came on for hearing, the court, with the advice of the Trinity Masters, was of opinion that the damage had been caused by *The Volant*, but I postponed making any decree at the time, in order to consider the legal question which was then raised, with respect to the liability of the owners of the damaging vessel to make good the damage beyond the amount of the value of the ship, for which the bail has been given. Two cases decided in this court were cited in the argument, as having a bearing upon the question, and the first case to which I shall now advert is the case of *The Triune*, reported in 3 *Haggard*, p. 114. In that case the vessel had been arrested and no [\*386] bail given, but an appearance was entered on behalf of the master, the principal owner. At the hearing of the cause the court pronounced against the vessel, and condemned the master. the vessel, and freight in the damage and in the costs. The ship was sold, and the proceeds were insufficient to cover the amount of the damage in the extent of 400*l.* A monition was then decreed against the master for that sum, and he was subsequently attached and imprisoned. Now, in order to contrast that case with a case which came under my own consideration, it must be noticed, that in the case of *The Triune* an appearance had been entered by the master, the principal owner only. No bail was given. Sir J. Nicholl inquired whether there was any precedent for the application for the attachment; and lastly, when he decreed the attachment to be issued, that learned judge gave no reasons and stated no case. In the more recent case which came under my own consideration, the case of *The Hope*, 1 Rob. Jr. p. 154, an appearance was given for three part owners, who were resident in Scotland. The damage was between 1,300*l.* and 1,400*l.*; bail was given in 1,500*l.* and the value of *The Hope* was 810*l.* It also appeared that the master and part owner was on board at the time, and that the collision arose from his own fault and misconduct. The case of *The Triune* was not referred to,

and I was of opinion that the motion to make the part owner personally responsible for the excess of damage beyond the proceeds of the ship could not be granted. There is some distinction in the circumstances of the two cases, but not of any material importance, and looking to the absence of all former precedents, and to the difference of opinion which has been entertained by my predecessor and myself, it is, I think, my duty to consider the question an \*open question, and to pronounce that decision which in [ \*387 ] my judgment is most conformable to law, without feeling myself concluded by my own decision in the case of *The Hope*, or by the previous decision of Sir John Nicholl in the case of *The Triune*. By the ancient maritime law, the owners of a vessel doing damage were bound to make good the loss to the owners of the other vessel, although it might exceed the value of their own vessel and the freight. For the purpose of enforcing this obligation the owners of the damaged vessel might resort either to the courts of common law or to the Court of Admiralty; and if they preferred the latter, they had their choice of three modes of proceeding, namely, against the owners, or against the master personally, or by a proceeding *in rem* against the ship itself. The Court of Admiralty has jurisdiction over the whole subject-matter of damage on the high seas, and the arrest of a vessel is only one mode of proceeding. The damage confers no lien upon the ship, but an arrest offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment. There may indeed be cases in which it would be almost necessary to proceed in this court, and in which there could be no other effectual remedy, although the ship could not be arrested. For instance: suppose the vessel which occasioned the damage belonged to a foreigner, and had gone away to some distant part of the world, or it were impracticable to bring an action at common law, by reason of the crew being dispersed, or the expense of producing them as witnesses in a trial at law too onerous to be borne. Again, suppose the ship doing the damage to have been sunk or lost immediately after the collision: I know of no reason why an action could not be \*maintained in this court, although [ \*388 ] the ship could not be arrested. The jurisdiction of this court does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality. Looking to a proceeding by the arrest of the vessel, it is clear, that if no appearance is given to the warrant arresting the ship, there can be no proceedings against the owners; for the court cannot know who are the owners; the court cannot exercise any power over persons not before the court, and never personally cited to appear: the decree must be

confined exclusively to the ship. Where there is an appearance to the action and bail given, as to the bail the decree cannot be extended beyond what they, who are strangers to the cause, have voluntarily made themselves responsible for; but in a case where the owner has appeared, the question is to what extent he has appeared to the process against the ship. It is material to see how that process is worded. "It decrees the ship to be seized, and it cites all persons having or pretending to have any right, title, or interest therein, to appear in this court, on certain days and hours, there to answer in a cause civil and maritime." The owners are only called in respect to any right, title, and interest, in order that they may appear and intervene for their interest in the vessel, and not further. Now, if it were possible, on such warrant, to demand bail beyond the value of the ship, or if the process against the owners went to make them responsible beyond the value of the ship, there could be no reason why bail should not be commensurate with the damage, where the amount is not restricted by statute; but if bail could not be demanded beyond the value of the ship, I do not see [ \*389 ] how the owners, in \*that proceeding, can be made further responsible; the warrant of arrest is confined to the ship, it goes no further. It appears to me, therefore, that there is no personal liability beyond the value of the ship, for this obvious reason, that the original process would not justify any such proceeding; the appearance given by the individual himself would not justify such proceeding, he has appeared only to protect his interest in the ship. I should have been of this opinion even independently of a case which it is now my duty to examine with some particularity; it is a case reported in 2 Barn. & Ald. p. 2, *Wilson v. Dixon*. It was an action against several defendants as ship-owners for damage sustained by the loss of goods laden on board their ship. By the first section of the 53d Geo. III. c. 159, the responsibility of owners is limited, both with respect to goods carried, and damage done to other vessels without their fault or privity; it is unnecessary to look at the statute at length; every word of the section applies equally to goods carried on board and receiving damage, and to any damage done by the carrier vessel to another vessel; there is the same limit in both cases, *videlicet*, the value of the ship and freight, where the act is done without the fault and privity of such owner and owners. The question which arose in that case was this: Were the carriers liable beyond the value of the ship and freight, by reason that the master was part owner, and the loss occasioned by his misconduct? The Court of the King's Bench determined in the master's favor. Bayley, Justice, says, (p. 13,) "The meaning of the clause is, that if the master be a part owner,

his responsibility, if you sue him in his character of master, and not as one of several part owners, will not be affected by the first \* section of the act, but if you sue him as one of the [ \* 390 ] part owners with the other part owners, the circumstance of the loss being occasioned by his fault, and with his privity, will not take away from the other part owners the protection which the first section of the statute intended to give them." Now, in words, Justice Bayley confines his observation to saying that "it will not take away from the other part owners the protection of the statute," but in substance and effect it applies to the master, for he was sued as part owner, and was equally protected by this decision. In that action, therefore, the decision was in favor of all the part owners, the master included. There is not, indeed, precisely the same form of action in this court, but the principle which governed that decision is applicable in justice to this case. I am of opinion, that to render a master, part owner, guilty of neglect, responsible beyond the value of ship and freight, you must sue him as master in first instance; but then you must proceed by charging him with being the cause of the damage by his misconduct, and that cannot be done directly or indirectly in another suit. An appearance is given for all the owners, not for the master only, and I cannot select one owner on whom to fix the responsibility where there are several; the master is not personally sued at all in this form of proceeding. Suppose no bail given, may not the owner abandon the ship? and can the court do more than sell the ship for the benefit of the plaintiffs in the action? No further liability can be imposed on the owner, save as to the costs. On authority, and on principle, every person ought to be liable to costs if justice requires it; if, in truth, there were any other decision, if the liability of owners was limited to the \* value [ \* 391 ] of the ship itself, whatever the amount of costs, it would be their policy to litigate every case, in order to deprive persons suing them of any benefit of a decree by reason of the costs incurred in obtaining it.

I pronounce for the damage, but I cannot enforce the payment beyond the value of the ship and freight, and I condemn the owners in the costs.

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The Druid. 1 W. Rob.

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THE DRUID, Newton.<sup>1</sup>

April 25, 1842.

Owners are not responsible for damage wilfully committed by a master in their employ, the acts of such master not being within the scope of his ordinary duties nor otherwise directed or subsequently sanctioned by them.

THIS was a case of damage by collision promoted by the owner of the Danish sloop The Sophie against the steam-vessel The Druid.

The act on petition in substance set forth — That on the 12th of October, 1841, the sloop Sophie, of the burden of seventy-three tons, and efficiently manned with a licensed pilot on board, had proceeded down the river Mersey as far as Bootle Bay, and nearly opposite the Rock light-house, when The Druid, belonging to a steam-tug company in Liverpool, ran several times violently into her on the larboard quarter, thereby starting her bulwarks, and causing her to slew round and drive violently against a bark then under sail to leeward of her; the master of the steam-tug at the same time demanding 5*l.* of the master of the sloop on pretence that it was due for towing the sloop into Liverpool, and threatening that unless it was paid he would run the sloop's mast or bowsprit overboard. That the demand not being complied with, the master of the same immediately passed one of the haw-

sers round the shrouds of the sloop, and declared that she [ \* 392 ] should not go to sea till it was paid. That \* the sloop soon after got clear of the steamer by cutting the hawser afore-said; but I. N., the master of the steam-tug, almost immediately again ran the steamer with great violence into the sloop, and passed a chain round the foremast shroud, by which he dragged the sloop with great force up and down the river, causing her to slew round in all directions and severely training her rigging and upper works.

That the sloop was so dragged about for a considerable time, and until she came into shoal water. That the pilot then called upon the master of the steamer to tow the sloop into deep water, which he accordingly did, but that it was then more than two hours' ebb, and impossible for the sloop to proceed on her voyage.

That the sloop having been taken to the Magazines, was there brought to anchor. That during the night of the 12th the wind blew a heavy gale from the north-west, and continued to blow violently

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<sup>1</sup> [S. C. Notes of Cases, 444.]

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The Druid. 1 W. Rob.

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from the west until the 15th of the said month of October, when an attempt was made to get her into dock, but which was ineffectual, all the docks being at that time full.

That on the 16th the sloop was driven off Seacombe, where at low water she struck the ground, and thereby sustained considerable damage. That during the night the wind increasing almost to a hurricane, the sloop drove with the larboard side athwart the lee bow of a large Liverpool ship and became entangled with the cathead and bower anchor, whereby the larboard side and bowsprit of the sloop were severely injured. That the strength of the tide forcing the sloop almost on her beam ends, she again struck with violence against the \*said ship, and the crew being apprehensive that [ \* 393 ] she would sink, made the best of their way on board the ship. That when the flood-tide began to decrease the sloop righted again, and the crew returned to her, and by great exertions and a considerable risk they succeeded in carrying her into the Princes Dock Basin, on the 18th of the said month of October. That on the following day a survey was held upon her, when it was found that all her seams were so much strained and open that it would be necessary to discharge her cargo in order to undergo the repairs requisite to enable her to prosecute her voyage. That in unloading the cargo it was found that there was a deficiency of sixteen tons of the salt on board, such deficiency having been occasioned by melting and leakage in consequence of the circumstances aforesaid. Wherefore, &c.

The reply of the owners of the steam-tug denied that any directions or any authority had ever been given by the directors of the company or any of them, to the manager or to any of their captains or servants, to detain or attempt to stop or in any way molest vessels under the circumstances stated in the act on petition. It also expressly denied that any directions or authority had been either directly or indirectly given to I. N., the master of The Druid, to detain or molest the sloop Sophie, or that the acts alleged to have been committed by him were ever authorized, or that they were or have since been in any manner sanctioned by any or either of the directors of the said company; on the contrary, they have been highly disapproved of. The reply further went on to deny generally the liability of the company to make good the damage, upon the ground that it was no part of \*the business of the said I. N., as master of the said [ \* 394 ] steam-tug, to tow the vessel in the manner alleged, and in so doing he went out of his way maliciously for that purpose.

The case was argued by — *Addams* and *Bayford* for the owners of The Sophie.

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The Druid. 1 W. Rob.

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*Queen's Advocate and Haggard, contra.*

JUDGMENT.

DR. LUSHINGTON. This is a suit promoted by the owner of a Danish vessel, The Sophie, which, upon the 12th of October last, was proceeding out of the port of Liverpool on her return voyage to Kallundburg in Denmark. Whilst so proceeding the steam-tug The Druid, the vessel arrested in this cause, ran several times violently into her; Newton, the captain of the steam-tug, at the same time demanding the payment of 5*l.* which he alleged to be due to his employers for towing The Sophie into Liverpool. The master of The Sophie refused to pay the demand, denying that any towage was due, whereupon Newton, the captain of the steam-tug, declared that he would detain her, and although warned that he would be held responsible for his conduct, he caused a chain to be fastened to The Sophie's foremast, and in a violent manner towed her about, and at last carried her up the Mersey and left her at a place called the Magazines. In consequence of this treatment The Sophie received considerable damage, was prevented from proceeding on her voyage, and great loss and injury subsequently accrued. To obtain redress for the injury proceedings were instituted, and the steamer was arrested under [ \* 395 ] the process of \*this court. An appearance has been given for the owners of The Druid, and the facts of the case, as they are set forth in the act on petition, are not controverted. The defence of the owners of The Druid is, that they are not responsible for the wilful and malicious acts of Newton, their servant; which acts it is alleged were not authorized by them before they were committed, nor sanctioned or adopted by them afterwards. Before I determine whether the defence which is thus set up can be sustained in law, I must first consider how far the facts upon which it is rested are established in the evidence before the court.

It is stated on behalf of the owners of The Druid, that an agreement exists between the company to which that vessel belongs, and the masters of their vessels, that the captain of each steam-tug shall, upon performing any towage service to vessels going out or coming into the port of Liverpool, obtain from the master of the vessel towed a certificate of the service rendered, and of the amount agreed to be paid, and if this certificate is not produced, the master of the steam-tug is to be charged with the amount. It is also further stated, that they were informed by Newton, the master of The Druid, that he could not obtain the 5*l.* due for towing The Sophie into Liverpool, and that they wrote to Gustavus, the master, calling upon him to pay that amount, but that he refused to do so. Now, upon this

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The *Druid*. I W. Rob.

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statement alone it would be impossible to conclude that the company directly or indirectly authorized the forcible detention of *The Sophie*. The orders given by them to their captains are reasonable orders, and there is nothing to show any intention on the \*part of the company that these orders should be executed [ \*396 ] in an illegal manner. On the contrary, I find it expressly averred in the reply to the act on petition in the following words, "That no directions or authority have ever been given by the directors of the company, or any of them, that the captains or any captain of any of their tugs shall stop or attempt to detain or in any way molest any vessel, the captain of which vessel has refused or might have refused the certificate of service, or have refused or may refuse payment of any demand."

This averment is supported by sufficient evidence on the part of the owners of *The Druid*, and is not contradicted on the other side. As regards any authority, therefore, prior to the time when the unfortunate transaction commenced, I am bound to assume that Newton, the master of *The Druid*, was wholly unauthorized by the company to act as he has done in the present instance. It must be considered, in the next place, how far his conduct was subsequently sanctioned and adopted by the owners of *The Druid*, so as to fix upon them a participation in his acts and render them legally responsible for the consequences that ensued. It has been urged against them, that after the misconduct of Newton had been made known to them they authorized their manager to call upon the attorneys of *Gustavus*, the master of *The Sophie*, for the purpose of arranging with them a compensation for the injury which had been committed; and this fact has been much relied on, and is said to be admitted by the owners of *The Druid* in their own statement in reply to the act on petition. Now in my view of it, if this fact stood alone unaccompanied \*by any further statement or explanation from the [ \*397 ] owners of *The Druid*, I do not think that I could hold it to be an adoption of the act of their captain or an admission of any responsibility on their part so as to bind them in law. I am not prepared to say that if, before a suit is commenced, a master being cognizant of an injury done by his servant shall negotiate for the compensation of that injury by the payment of a sum of money, out of court, the master would be so far concluded by the negotiation, that he could not avail himself of any legal defence to the action. I know of no legal principles which would sustain such a proposition. But it is unnecessary to pursue the inquiry further, for this reason, that it is expressly alleged and sworn, and is not contradicted, that the negotiation carried on by the manager of the company was con-



ducted, not on behalf of the company, but on behalf of Newton, the master. Dismissing, therefore, from my consideration any averments of previous authority or subsequent adoption of the acts of Newton as being wholly unsupported by proof, I must now examine the legal bearing of those facts which are either proved or admitted in the cause.

The facts in the case upon which the court must proceed in forming its judgment are these: that at the time of the aggression Newton was in command of the steamer, and engaged in his usual occupation of looking out for vessels requiring towage assistance. That it was his duty, in compliance with the order of the company, to make the demand for the towage money in question. That in making the demand he was acting in the service of the company. That

the aggression and detention were neither authorized by the [ \* 398 ] company nor were naturally \* incidental to any directions given by them. And lastly, that the assault and detention were the wilful acts of Newton himself, and that the damage which is now sued for was occasioned in consequence thereof. Upon this state of facts, the inquiry arises what are the principles of law by which the decision of this case must be governed? The answer, I apprehend, is this, namely, the rules and principles which govern the cases of principal and agent, of master and servant, as they have been laid down and adopted in the courts of law in this country. The unfortunate owner of The Sophie, who is now seeking his redress by suing this ship and her owners, it is true, is a foreigner, a subject of Denmark, but his title to redress must be ruled by the municipal law prevailing in the courts of this kingdom and governing the court in which he sues. I have purposely adopted the expression "suing this ship and her owners," with the view of considering a point which was incidentally raised in the argument, whether the liability of the ship and owners is to be measured by the same rules, or whether the ship could be made liable although no personal responsibility should attach upon the owners.

Before I proceed further, I will now endeavor very shortly to dispose of the point to which I have just adverted. Now in some cases it is obvious that a ship may be liable where the owners would not be personally responsible, as, for instance, in cases of lien upon a ship for seamen's wages or bottomry bonds, when the lien has been acquired before the existing owners made their purchase. Against such liabilities the purchasers must protect themselves by caution or by [ \* 399 ] contract at the time of \* sale, as against the enforcement of the outstanding lien in a proceeding against the ship in this court, they would have no legal defence upon the plea that the exist-

ence of the lien was unknown to them at the time the purchase was effected.

Again, it might possibly be that an innocent purchaser may be liable to have his ship arrested and sold for the payment of damages in a case where the former owners would have been responsible, and the damage was occasioned before the purchase was made ; but upon this point I give no opinion whatever. In the case above mentioned, it is to be remembered that the liability must be assumed to have attached upon the ship prior to the time when the ownership vested in the existing owners. In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms ; the ship is not liable if the owners are not responsible ; and *vice versa*, no responsibility can attach upon the owners if the ship is exempt, and not liable to be proceeded against.<sup>1</sup>

Having thus disposed of the incidental question which has been raised, it remains for me to apply the principles of law laid down in the reported cases, so far as they bear upon the circumstances of the present case. The general principle of law that the master is liable for the acts done by his servants \* within the scope [ \* 400 ] of their employment, is not denied, but it is contended, on behalf of the owners of *The Druid*, that the principle does not apply to this case, and that no such liability exists where the servant, though occupied in the affairs of his master generally, has occasioned an injury by his violent, wilful, and malicious conduct. The justness of the reasoning upon which this distinction is founded, is, I must confess, not altogether apparent to my mind ; and if I had been called upon to decide this question upon my own judgment alone, in the absence of any decided cases, I might, perhaps, have felt some difficulty in arriving at the conclusion to which I am about to come in the present instance. It is consistent with reason and natural justice, that a master should be responsible for the skill and honesty of the agent whom he employs in the management of his business. He selects him, and holds him out to the world as a fit person to be trusted, and in so doing to a certain extent he may be said to contract with the per-

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<sup>1</sup> [See observations on this case in *The Bold Buccleugh*, 2 Law & Eq. Rep. 540 ; s. c. 3 W. Rob. 220.]

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son with whom he deals for the existence of these qualities in his agent. Unless, therefore, the principal was responsible, mankind would have no security or protection in the ordinary transaction of their affairs. The principal would be deriving a benefit from the acts of his agent, whilst the persons who may be dealing with that agent, if injured by his misconduct, would have no remedy but by an action against the agent himself, who might be wholly unable to make a compensation. The result would be, that all mutual confidence between man and

man, upon which the business of life depends, would be [ \* 401 ] destroyed. Upon this ground, I \* apprehend the doctrine of the master's responsibility was founded, and upon this principle the case of *Grammar v. Nixon*<sup>1</sup> was decided. In that case a goldsmith's apprentice sold an ingot of gold and silver, upon a special warranty that it was of the same value per ounce with an assay then shown. Upon the evidence, it appeared that he had forged the assay, and that the ingot was made out of a lodger's plate which he had stolen. The learned judges by whom the case was decided, held that the goldsmith was liable for the forgery and fraud which had been practised by his apprentice. But it is said that the present case is one of violence and wilful aggression, and is upon that ground distinguishable from a case of fraud. The reason of this distinction, as I have already observed, is not very apparent. It may perhaps be argued that fraud and perjury may occur in the ordinary transactions of business, but violence cannot possibly be contemplated in the discharge of any duty. This reasoning may be true, but to my judgment is not satisfactory. Again, it may be said that, in committing an act of wilful and malicious violence, the agent renders himself criminally responsible; but this reason, I apprehend, does not supply any solid distinction, for it may occur that the master of a ship may be criminally responsible, and yet the owners be liable for the damages, as in the case of a steamer going through a crowded roadstead in a dark night, at full speed, and thereby occasioning a collision and destruction of both ship and crew. In such a case I conceive the master would be indictable for manslaughter, and yet the owners would be responsible for the damage. Another reason may [ \* 402 ] \* perhaps be suggested, namely, that by holding the principals responsible for the malicious acts of the agent, when committed out of the scope of his employment, the principals would be exposed to such risks as would deter them from embarking in business transactions which they could not superintend in person, and the

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<sup>1</sup> *Strange's Reports*, vol. i., p. 653.

general commerce of the world would be injuriously fettered and restricted. But it is useless to pursue the speculation upon this point more in detail. I must look to the decided cases, and must be governed by the rules which they have laid down, and not by any abstract reasoning or doubtful conjectures of my own.

Passing over the earlier cases, I must notice the case of *Macmanus v. Crickett* (1 East, 106.) In that case, the servant of the defendant had wilfully driven his master's carriage against the chaise of the plaintiff; and in making the rule absolute for entering a nonsuit, the court incidentally decided that no action would lie. The marginal note is in these words:—"A master is not liable in trespass for the wilful act of his servant, as by driving his master's carriage against another, done without the direction or assent of the master. But he is liable to answer for any damage arising to another from the negligence or unskilfulness of his servant, acting in his employ." The judgment was delivered by Lord Kenyon, and embodied the unanimous opinion of the court, amongst whom was Mr. Justice Lawrence. In the course of his judgment, Lord Kenyon says:—"The technical reason in Rolle's Abridgment, with respect to the sheep, applies here, and it may be said that the servant, by wilfully driving the chariot against the chaise without his master's assent, \*gained a special property for the time, and so to that purpose the chariot was the servant's;" and this passage immediately follows:—"This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskilfulness of his servant, who had no purpose but the execution of his master's orders. It does not appear, therefore, that the case of *Macmanus v. Crickett* contains any express decision that no action would lie under the circumstances then under discussion, where a servant has driven his master's carriage wilfully against another carriage."

I must next refer to the case of *Boucher v. Nordstrom*, 1 Taunt. 368. The marginal note is to this effect: "If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time." Upon the original hearing of the case, Sir James Mansfield, by whom the case was heard, expressly stated that the action was not prevented by the fact that the injury was done by one of the crew; that upon general doctrines the master was responsible on the supposition and assumption that he had the power of hiring and dismissing them; and the verdict was returned for the plaintiff. In arguing the rule *nisi*, Sergeant Vaughan moved to set the verdict aside upon two grounds;

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first, that the action ought to have been brought against the pilot, not against the captain; secondly, that the action ought to have been case, not trespass. Sergeant Shepherd in showing cause said, an action upon the case could not have been maintained, for the act was

not an act of negligence, but of wilful cutting; trespass, [ \*404 ] therefore, \* was the right action. In the case of a sheriff, trespass lies against him for the act of his bailiffs. The

court held that it did not appear that the captain had done any act in the case; the rule to enter a nonsuit\* must be made absolute. This is all that is reported to have occurred in the case of *Boucher v. Nordstrom*, and it is to be observed that in the latter case of the decision in *Macmanus v. Crickett* was not referred to. If the cases had rested here, therefore, I should have experienced some difficulty in ascertaining what was the common law doctrine upon the subject. But I am relieved from this difficulty by the more recent case of *Lyons v. Martin*, which is reported in the 8th Vol. *Adol. & Ellis*, p. 512. In that case a servant drove a horse from the highway into his master's field, and then distrained it. The court held that the master was not responsible for the act of his servant. Mr. Justice Coleridge, before whom the case was originally heard, was of opinion that as the act of seizure was not within the scope of a servant's ordinary employment, some direct authority from the master ought to be proved, and this not being done, the plaintiff was nonsuited. Upon the motion for a new trial, Lord Denman said, "I think the learned judge ruled rightly. It is clear that the wrongful act could not be traced to the master. He had authorized nothing that was not lawful. He has pleaded a special plea, but that is out of the question. The case here is of an act in itself unlawful, and the question then is whether that particular act was authorized. The instances where an injury has resulted from negligence in performing a lawful service do not apply. In the *Attorney-General v. Riddle*, where the wife of a paper-maker had illegally delivered out

[ \*405 ] paper \* without proper stamps, the Court of Exchequer held it to be a fit question for the jury, whether or not the husband was chargeable with her acts, as done under his authority, but that decision proceeded on the supposition that the husband was generally presiding over the business, and that any thing done in the management of it by a person usually acting in it under his control, as the wife was shown to have been, might be referred to him." And Mr. Justice Pattison said, "*Bruker v. Fremont*, and other cases where the master has been held liable for the consequences of a lawful act negligently done by his servant, do not apply. Here the act was utterly unlawful. A master is liable where his servant causes injury

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by doing a lawful act negligently, but not where he wilfully does an illegal one. Every person is to be taken to know the law." I understand that since this decision in *Lyons v. Martin*, another case has been decided in the Court of Exchequer. The case is not at present reported, and I will not therefore refer to its circumstances, but I am informed that the decision in question extends the principle of the doctrine even beyond that laid down in the case of *Lyons v. Martin*. The result of the decision to which I have referred most clearly establishes, that at common law an action could not be maintained against the company to which *The Druid* belongs in the present instance, and if no such action could be supported at common law, it cannot be maintained here. I am, therefore, under the necessity of dismissing the owners. I cannot, however, leave this case without expressing my deep regret that in British waters, within British jurisdiction, the unfortunate foreigner who is master and owner of this \*vessel should have been subjected to this outrage [ \* 406 ] and loss, not only without redress, but without any punishment being inflicted upon the aggressor. If the master of *The Druid* go without punishment, and the owner of *The Sophie* without redress, the example must be of evil effect; it will discourage the trade of foreigners with this country, afford a mischievous precedent for the like ill-treatment of British vessels in foreign ports, and most certainly bring great discredit upon British justice and British hospitality.

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THE INDIA.

April 30, 1842.

Salvage reward is for benefit actually conferred in the preservation of property, not for meritorious exertions alone.<sup>1</sup>

A claim of alleged salvors disallowed upon the ground that they had quitted the vessel leaving the salvage service uncompleted.

In this case *The India*, a Swedish vessel, got upon the *Scoby Sand*, on the coast of Norfolk, in the night of the 8th November last, and upon the following morning a boat's crew from Yarmouth put off to her assistance, and their services were accepted. During the whole of the 9th the boatmen were actively employed in assisting

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<sup>1</sup> [*The Ranger*, 3 Notes of Cases, 589; *Clarke v. Brig Dodge*, Healy, 4 Wash. C. C. R. 651.]

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The India. 1 W. Rob.

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the vessel, but on the morning of the 10th they returned to Yarmouth in their boat, taking with them the entire ship's company, and leaving The India a derelict on the sand, and without expressing any intention of returning to her. Whilst so abandoned, The India was boarded by a second set of salvors, who laid out an anchor and adopted the necessary measures for getting her off the sand, and in the afternoon of the 10th, eight of the Yarmouth boatmen returned to the ship and claimed to join in the salvage operations of the persons then on board her, on the ground of their former services to the vessel. The claim was resisted by the second salvors, who [ \* 407 ] ultimately \* succeeded in getting the India off the sand, and by the assistance of a steam-tug carried her into Yarmouth Roads and beached her in safety upon the shore.

Separate actions were entered by the two sets of salvors, and in January the vessel was arrested at the suit of the Yarmouth boatmen, and was detained under arrest until the final hearing of the cause.

The services of the second salvors were admitted by the owners, but the claim of the Yarmouth boatmen was resisted upon two grounds; 1st. That no salvage had been effected by them. 2dly. That they had been guilty of misconduct in pillaging the vessel whilst on board.

The case was argued by *Haggard*, for the Yarmouth boatmen.

*Phillimore*, for the second salvors.

*Jenner*, for the owners.

Upon the merits of the case, the court pronounced for the claim of the second salvors, and dismissed the suit of the Yarmouth boatmen with the following observations.

"The first question which I have to decide, is, whether the Yarmouth salvors are entitled to any salvage at all, under the circumstances disclosed in the evidence before the court? Upon this part of the case I feel no doubt or difficulty with respect to the conclusion to which I must come. Assuming that all that was done by the crew of the Yarmouth boat was done with propriety, still the measures which they adopted were unsuccessful in the result, and upon the morning of the 10th they abandoned the vessel leaving their service un- [ \* 408 ] completed. It is, therefore, impossible to \* hold that any salvage service in the legal acceptance of the term had been rendered to the owners of The India when they so left that vessel.

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The India. 1 W. Rob.

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The principle of salvage law which governs the practice of the court is this. That however meritorious the exertion of the alleged salvors may be, if they are not attended with benefit to the owners they cannot be compensated in this court; salvage reward is for benefit actually conferred in the preservation of property, not for meritorious exertions alone. It has been said that the return of the boatmen to Yarmouth was merely temporary, and that when they left The India they did so with the sanction and at the request of the master for the purpose of landing him and his crew, and of transacting some private business of their own at Yarmouth, intending when their object had been accomplished to return to the vessel and continue their exertions for its preservation.

" This intention, it has been urged, is to be inferred from the whole *res gestæ* of the case, and in support of this inference the counsel for the boatmen have more especially relied upon the fact that some of the boatmen actually did return in the course of the day, and were, as it is alleged, prevented from renewing their services to the ship by the opposition of the second salvors, who were at that time in possession of her. Now if it could be established to the satisfaction of the court, that when the boatmen returned to Yarmouth with the master and crew of the vessel, there was only a temporary suspension of their services, and this with the concurrence of the master, and that they really intended to return to the vessel and renew their exertions, as suggested in the argument, this circumstance would

\* undoubtedly have a most material bearing upon the claim [ \* 409 ] which they have set up. Looking, however, to the evidence in the cause, and to the *res gestæ* of the case itself, I am unable to discover any grounds to sustain the inference of any such intention on the part of the Yarmouth boatmen. I do not find in the affidavits of Denny and his fellow boatmen any averment whatever that it was their intention to return; on the other hand, it is strongly in favor of a contrary presumption, that Denny, the principal man of the Yarmouth boat's crew, and the *dux facti* in the original enterprise, never did return at all; other circumstances are also to be found in the *res gestæ* of the case which induce me to conclude that, when the boatmen first quitted The India, they had no intention of returning to render any further assistance to her.

" What was the state of the vessel and what the period of time when they so quitted her? Notwithstanding the endeavors which had been made for her preservation, she was still fixed upon the sand, and the water was flowing up to the deck. Again, at the very moment of their leaving her the tide was about to flow, and the opportunity was consequently most favorable to the continuance of their exertions if they had entertained any hope of getting the vessel



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off the sand. Taking these circumstances into consideration, it is manifest to my mind that they did not intend to return; but thinking the case to be absolutely desperate, they had finally resolved to abandon the vessel to her fate. If this be so, the legal effect of this abandonment upon the claim which they have set up, is in no degree altered by the fact, that some of the boatmen subsequently [ \* 410 ] returned, and endeavored to force their assistance upon the second salvors, who were at that time in possession of the vessel. Having abandoned the possession of the ship, they had no right to recover it against the second salvors; and those persons were justified in resisting the offer of additional assistance, which, under the circumstances, would have been superfluous. •

“ I cannot therefore attribute any merit to them, in having put forward, upon the occasion of their return to *The India*, a claim which they were not entitled to assert. Upon the whole facts of the case, then, I must pronounce against the claim which has been advanced on behalf of the Yarmouth boatmen; but as I am not satisfied of the truth of the charges of misconduct which have been made against them, I shall not condemn them in the costs.”

Upon a subsequent court day, 10th May, 1842, *Jenner* applied to the court to condemn the Yarmouth boatmen in the expenses of the fees paid to the officer of the court who had been in possession of the vessel from the time of her arrest; the vessel having been detained in the custody of the court for several months, at the suit of the said boatmen, and, as the court had now decided, unjustifiably.

*Haggard, contra.* The expenses of these fees are customarily discharged by the owners of vessels where bail is given, and the prolonged detention of the ship in the custody of the court's officer raises no distinction in the present instance; such detention having been caused by the default of the owners in not having produced sufficient bail to the action.

[ \* 411 ] • *Jenner.* The action having been entered in the sum of 1,000*l.*, bail was offered to the amount upon condition that the ship should be released, but this offer was refused upon different estimates being entertained between the owner and salvors, as to the value of the ship.

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PER CURIAM. If the owners of the ship had given in their affidavit of value, and had applied for a *supersedeas*, and the vessel had been detained by the asserted salvors, I should have considered them guilty of vexatious conduct, and have condemned them in the costs

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The *Ariadne*. 1 W. Rob.

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of such further detention of the vessel. In the absence, however, of any such application in the present instance, I cannot, I think, condemn them in the costs as prayed for.

Motion refused.

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THE *ARIADNE*, Macleod.<sup>1</sup>

May 31, 1842.

Boggs, Taylor & Co., of London the mortgagees in possession of a ship consigned to Bruce, Shand & Co., of Calcutta, subsequently mortgaged the vessel and her freight to an assurance company in London, as security for a loan of 5,000*l*.

Prior to the departure of the ship from Calcutta, advances are made, and a bottomry bond is executed in favor of Bruce, Shand & Co., the consignees. Bond opposed upon three grounds.

1st. That it was not originally a bottomry transaction.

2d. That the advances were made for the payment of debts previously incurred by the vessel.

3d. That Shand, being a partner in the house in London, and also in Calcutta, was against the general integrity of the transaction in question.

Bond pronounced for, with costs.

THIS was a cause of bottomry, promoted by Bruce, Shand & Company, of Calcutta, against the ship, her tackle, apparel, &c.

The circumstances of the case are fully noticed in the judgment of the court, and the case was argued by —

*Haggard* and *Harding* for the bondholders.

*Addams* and *Bayford*, *contra*.

JUDGMENT.

DR. LUSHINGTON. The bond sued for in this case is dated the 19th of July, 1841, the vessel at that period lying at Calcutta, and it is granted for the sum of 853*l*. with 12 per cent. maritime interest, for the voyage from Calcutta to London. The ship arrived in this \* country on the 7th of November, and upon the 20th of [ \* 412 ] December, 1841, she was arrested at the suit of the obligees in the bond. An appearance was entered to the action by the directors of the Maritime Assurance Company, and the suit was com-

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<sup>1</sup> [S. C. 1 Notes of Cases, 494.]

menced in the usual form, by an act on petition. It is important to consider, in the first instance, the averments which have been set up in the pleadings on the one side and on the other, for although it may sometimes happen that a bond may be supported by facts which come out incidentally in the evidence, the attention of the court must be primarily directed to those points which are more immediately put in issue in the pleadings; and it would be most inconvenient to decide the case, not according to what is alleged and proved, but according to that which incidentally transpires in the course of the suit. The act on petition of the bondholders shortly states that money was wanting to enable the ship to put to sea; that Bruce, Shand & Co. of Calcutta, advanced that money, upon the security of a bond of bottomry; and that the bond in question has not been discharged since the arrival of the ship in this country. On behalf of the assurance company, whose title to oppose the bond is founded upon an asserted mortgage of the vessel in the sum of 5,000*l.*, it is alleged, in answer to the act on petition, that previous to February, 1841, Boggs, Taylor & Company, of London, were the mortgagees in possession of the ship, and that they despatched her on the voyage from London to Calcutta, consigned to the house of Bruce, Shand & Co., at Calcutta. That the vessel arrived at Calcutta upon the 14th of May, 1841, and was immediately placed under [\*413] the \* control of Bruce, Shand, & Co., who made all the necessary advances as agents, and upon the personal security of Boggs, Taylor & Co., upon whom the master drew a bill for such advances, and which bill was in the amount of the sum now covered by the bottomry bond. That in February, 1841, William Shand, junior, a partner in the firm of Boggs, Taylor, & Co., and also in the firm of Bruce, Shand, & Co., obtained from the Maritime Assurance Company a loan of 5,000*l.* on mortgage of the ship, and at the same time Boggs, Taylor & Co. also mortgaged the freight to Pirie & Co., without notice to the assurance company, who allowed the freight to be received in part by Pirie & Co., believing that the value of the vessel would be fully sufficient to repay the loan which they had advanced. That upon the arrival of the vessel in England, the fact of the bottomry bond at Calcutta was unduly kept back from the knowledge of the assurance company, and the first intimation of the existence of any such bond was communicated to them in a letter dated 21st December, and which letter was written by W. Shand & Co., of Glasgow, the said W. Shand being the father of W. Shand, junior, the partner in the house of Boggs, Taylor & Co., and of Bruce, Shand & Co. Lastly, that the bond was executed a few days before the ship left Calcutta, and was only resorted to by Bruce,

Shand & Co. upon their being apprised of the mortgage of the vessel by Boggs, Taylor & Co. to the Maritime Assurance Company. A reply was given in by the bondholders, and without entering minutely into its details it may be stated, that it consists not of mere denials only, but alleges a variety of facts in \* sup- [ \* 414 ] port of the bondholder's claim. The most material of these facts are, that M'Lellan & Co. were the real owners in possession of the vessel on her outward voyage from this country to Calcutta, and that Boggs, Taylor & Co. were the mortgagees only. That the ship was consigned by M'Lellan & Co. to the house of Bruce, Shand & Co. at Calcutta. That in December, 1840, M'Lellan & Co. failed, and Boggs, Taylor & Co. then sent out a power of attorney to Mr. Stafford at Calcutta to take possession of the vessel on their behalf, and upon his refusing to make the necessary advances, the same were supplied by Bruce, Shand & Co., entirely upon the security of a bond of bottomry, and that at the time they so advanced the money, they were wholly unapprised of the second mortgage of the vessel by Boggs, Taylor & Co. to the assurance company. The rejoinder states facts exclusively relating to the dealings of W. Shand, junior, with the assurance company, and concludes with an averment that the bill of exchange which was drawn by the master in favor of Bruce, Shand & Co. at Calcutta, was received by Boggs, Taylor & Co., and accepted by them on the 14th of September, 1841, prior to the arrival of the ship in England in the following month of November. Such is a brief outline of the pleadings given in by the respective parties in this suit, and in order more clearly to elucidate the real issue in the cause, I will now recapitulate the grounds upon which the validity of the bond is disputed.

First, it is alleged that the bond was not originally a bottomry transaction.

Secondly, that even if the money was advanced \* upon [ \* 415 ] bottomry it was advanced to pay debts previously contracted to Bruce, Shand & Co., and other persons.

Thirdly, that the conduct of W. Shand, junior, in his dealings with the assurance company, is full of suspicion, and raises an unfavorable presumption against the house of Bruce, Shand & Co., in which he is a partner, and also against the general integrity of the transaction in question.

Such being the grounds upon which the validity of the bond is impugned, how does the case stand which is set up on the other side in support of its legality? The bond itself is duly executed, and *prima facie* all is apparently correct and regular; with respect to the proofs in support of it, if not rebutted, they are, in my judgment, as

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sufficient and satisfactory as could possibly have been expected under the circumstances of the case, unless evidence had been procured under a commission to Calcutta, where the transaction took place. Macleod, the master of the vessel, swears in his affidavit that when the ship originally sailed from this country she was under the control of M'Lellan, as the owner, and the testimony of this witness is corroborated by the affidavit of M'Lellan himself, whom I must assume to be a disinterested witness in the cause, and this upon the averment of the opposers of the bond, who state that the mortgage upon the vessel much exceeds the amount of her present value. Macleod, the master, further swears, that the ship was consigned by M'Lellan to Bruce, Shand & Co., and upon the failure of M'Lellan & Co. she was delivered up to Mr. Stafford, as the agent of Boggs, Taylor & Co. With respect to the objection, that this delivery of the vessel to Mr. Stafford, was made with a fraudulent \*intention against the assurance company, I must confess, that looking at the whole *res gestæ*, and more particularly to the dates of the transaction itself, I am unable to arrive at any such conclusion. The bankruptcy of M'Lellan & Co. rendered the delivery of the ship to the agent of the mortgagees a probable and a prudent course of proceeding, and, as regards the dates, it is important to notice that the failure of M'Lellan & Co. took place in December, 1840, and the power of attorney to Mr. Stafford was immediately forwarded to Calcutta, but the loan from the assurance company was not negotiated until February, 1841. As far, therefore, as the transaction of the delivery of the vessel to Mr. Stafford can have any bearing upon the case, I see nothing improper in it; on the contrary, I think that it was a perfectly natural and a prudent measure to have been pursued under the circumstances of the case. The next consideration is the character of the advances which were made on behalf of the vessel by Bruce, Shand & Co., whether they were made upon the faith of a bottomry security or upon the personal credit of Boggs, Taylor & Co. It is expressly averred in plea by the bondholders, that they were made entirely upon the security of a bond of bottomry, and this statement is borne out by the evidence of the master, and is, moreover, consistent with the probabilities of the case. It is clear that some repairs to the vessel must have been necessary after the long voyage she had undergone from this country; and although the court has no means of ascertaining whether the master was originally supplied with funds by his employers, the master himself [\*417] swears that during his stay at Calcutta he \*had no other supplies, and that Stafford refused to make advances; and considering that Boggs, Taylor & Co. afterwards became bankrupts,

I see no reason to discredit this statement. It has been argued that the connection of W. Shand, junior, with the house in Calcutta, and also with the firm in London, raises the presumption that the house in Calcutta would make the advances upon the personal credit of Boggs, Taylor & Co., and this argument *prima facie* might not appear without weight. Looking, however, to the particular circumstances of the present case, the very connection of W. Shand, junior, as a partner in both the firms, in my view of it suggests a different inference, inasmuch as it renders it probable that through it the house in Calcutta would have been apprised of the circumstances of Boggs, Taylor & Co., and the firm in Calcutta would naturally look to their own interest, and not be guided exclusively by a regard to their connection with W. Shand, junior.

But even assuming the probability that the advances were made on personal credit, it could avail nothing in the present instance against the direct testimony of Macleod, the master, who positively swears that he had no credit or means of procuring resources other than the hypothecation of the ship, and that he could not have sailed unless the advances were made for which the bond was given. I see no reason to impute any misconduct to this witness, in respect to his conduct at Calcutta, and, in the absence of any impeachment of his veracity, I should be departing from the principles which govern the proceedings in this court if I hesitated to give credence to his affidavit. The statement which has been advanced on the other side, \*that Bruce, Shand & Co., having made their advances [ \*418 ] on personal security, afterwards received notice of the loan from the assurance company, and then, for the first time, converted the transaction into a transaction of bottomry, is altogether unsupported by any proof in the present instance. But even if this averment were proved to this extent, that Bruce, Shand & Co. were apprised of the loan which had been negotiated with the assurance company, the knowledge of this circumstance on their part would, it appears to me, be strongly in favor of the bottomry bond in question, and for the very reason which has been urged by those who oppose its validity. If the loan transaction with the assurance company was known to Bruce, Shand & Co., it must obviously have been known to them antecedent to the arrival of the ship in Calcutta; and if the knowledge of this circumstance would have induced them to convert advances on personal credit into bottomry, it would also have induced them not to lend their money upon personal security at all. Upon this part of the case, then, I am clearly of opinion that there is nothing to invalidate the affidavit of the master or the integrity of the transaction to which he has deposed. On the contrary, I think that the

whole argument against the bond has been rested upon an arbitrary assumption of dates, which is unverified in proof, and is altogether without any sufficient foundation.

Having thus far disposed of the first ground of objection upon which this bond is impugned, I have now to consider the second objection which has been raised against it, namely, that it was given for the payment of debts already incurred; and in approach-  
 [ \* 419 ] ing \* this part of the case I must observe, that it involves a question of law of great importance, upon which I do not feel myself called upon to pronounce any decision upon the present occasion. If I had to decide the legal question, whether or not a bottomry bond could be taken for advances of money to pay debts already incurred,<sup>1</sup> and if Mr. Baron Parke, in the case of *The Hersey*, expressed himself to the effect stated by the learned counsel, I should be most reluctant to interfere with the decision of that learned judge. But it is not necessary for me to give any opinion with reference to the point in question, and for the reason that, in the present case, there is no evidence from the bond itself, or from the affidavit of the master, to establish the supposition of facts necessary to be substantiated in order to compel me to consider the question of law. I have examined the bond, and it is in the ordinary form of *Calcutta bonds*. It recites that the money was advanced "for the necessary repairs and use of the said bark or vessel, and for furnishing her with provisions and necessaries for her said voyage, and to enable her to proceed on her said voyage." The affidavit of the master is in accordance with this statement. He says, "being in want of money to repair the bark and to procure the necessary supplies, he made an application," &c., &c. It cannot, therefore, be inferred from this statement that the master had already procured the necessary articles, and the case is in this important respect widely different from the case of *The Hersey*, in which it was expressly recited in the bond, "that the master was upon the point of proceeding to sea, and was justly indebted to persons in Hobart Town, in sums of  
 [ \* 420 ] \* money amounting altogether to 470*l.* or thereabouts, for provisions and other necessaries supplied in and on board the brig, for the support of the crew, and for supplies for the intended voyage," &c. Under the circumstances of the present case, therefore, the facts of the case do not raise the question of law involved in the second objection, and I am of opinion that the payment of the bond cannot be avoided upon that ground.

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<sup>1</sup> [In *The Hebe*, 2 W. Rob. 412, it was held that it could be.]

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I now come to the third and last ground of objection, namely, the conduct of Wm. Shand, Jr., and assuming the facts alleged against him to be true, I am at a loss to comprehend in what manner they can affect the merits of the question which I have to determine in the present instance. Assuming the loan from the assurance company to have been obtained, as suggested, for the benefit of Boggs, Taylor & Co., upon what legal principle could this circumstance alone affect the issue of the cause? It may be a circumstance of suspicion, but it is impossible to make it legal proof against the validity of the bottomry transaction with Bruce, Shand & Co., unless it could be shown that the houses of Boggs, Taylor & Co., and Bruce, Shand & Co., were one and the same, and had a common interest. It appears to me that the argument against the bond upon this part of the case has gone upon the presumption that there was such an identity of interest between these two houses, but the fact is not so. It is not unusual in the commercial world, for one individual to be a partner in two or more firms, and yet the firms be different and distinct in interest; and I myself recollect a case which occurred in the Prerogative Court, upwards of thirty years ago, in which it appeared \*that one individual was a partner in no less than [ \* 421 ] six of the largest mercantile houses in the city. I am, therefore, of opinion that the whole of the averments in plea, and all the argument which has been urged in relation to the conduct of Wm. Shand, Jr., have been founded upon an erroneous assumption both of law and of fact, and can have no legal bearing upon the decision of the question before the court. With regard to the bill of exchange, it was not necessary that it should have been noticed in the bond, and I cannot accede to the proposition which has been advanced by the counsel of the assurance company, that the bill of exchange was the real, and the bond of bottomry the collateral security for the money which had been advanced. It is a common practice in transactions of bottomry for the lender to require the twofold security of a bill of exchange in addition to the bond. In such cases, the rule is to present the bill of exchange in the first instance, and if there is reason to believe that it will be paid, the bond is not put in suit. This rule is not inconsistent with the suggestion, that the bond of bottomry is the original and primary security; for when the expression is used that a bond is the primary, and a bill of exchange a collateral security, it only means that the transaction is originally a transaction of bottomry, and the bill of exchange is given as an additional and more negotiable security. It has been urged in the argument as a circumstance unfavorable to the case of the bondholders, that the fact of the existence of the bond was not communicated to



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the assurance company immediately after the ship arrived in this country. In my view of it, there is nothing in this circumstance to affect the bond, or to impeach the fairness or integrity of the original transaction. I do not think that Shand & Co., of Glasgow, even assuming that they were acquainted with the embarrassments of Boggs, Taylor & Co., were bound to precipitate the fall of that house by putting the bond in suit, before it was known whether the bill of exchange would be paid or not; and this was not ascertained until after the bankruptcy had taken place. Upon the whole facts of the case, then, I must pronounce for the validity of this bond; and in so doing I am satisfied in my own mind, that the assurance company will not be prejudiced by reason of this bond, beyond what they might reasonably have expected from the nature of the security which they took when they advanced the loan to Boggs, Taylor & Co. They took a frail security, which they must have known might be affected and overridden by a subsequent bond of bottomry, and they must also have known that the ship could not come home from Calcutta without a supply of funds from Boggs, Taylor & Co., and if they were unable to make the necessary advances, there must be a bond of bottomry. They trusted to the house of Boggs, Taylor & Co. to do that which the firm has been unable to fulfil, and the firm of Boggs & Co. having failed in their engagement, I am wholly unable to conceive on what principle of law or of equity Bruce, Shand & Co. should be made to bear the burden of the loss.

Bond pronounced for with costs.

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[ \*423 ]

\* THE PANDA.

August 3, 1842.

The proceeds of certain property taken out of the possession of convicted pirates (the ownership in such property being unknown) condemned to the crown as droits of admiralty. Monition, calling upon all persons having or pretending interest therein, to show cause why the same should not be condemned to her Majesty in right of the crown, refused.

In this case the court was moved to decree a monition against all persons in general having or pretending interest, to appear and show cause why the sum of 144*l.* 17*s.* 10*d.*, which had been paid into the registry of the court, as the proceeds of certain property taken out of the possession of convicted pirates should not be condemned to her Majesty in right of her crown.

The facts of the case, as set forth in the affidavit to lead the monition were these : —

In the latter end of May, 1833, Captain Trotter, whilst cruising in H. M. S. Curlew, on the western coast of Africa, saw, in an American newspaper, that a piracy had been committed on an American brig, called The Mexican, of Salem, in September, 1832, by a pirate vessel, which plundered her of 20,000 Spanish dollars.

Having heard that a schooner answering her description was then lying in the river Nazaretto, Captain Trotter proceeded in chase, and in the month of June, 1833, fell in with the said schooner, which proved to be The Panda. The schooner blew up and was wholly destroyed, and the captain and the greater part of the crew effected their escape at the time, but in September following Captain Trotter succeeded in taking the captain and three of the crew, and afterwards eleven others were secured, and 683 Spanish dollars found in the captain's possession, and twenty-one dollars, as part of the property of the mate, was delivered up to Captain Trotter. The pirates were brought in The Curlew to this country, and were sent, by order of government, \* to Salem, in America, and being [ \* 424 ] identified by the master and some of the crew of The Mexican, seven of them were tried and convicted on the 25th October, 1834. The sum of 144*l.* 17*s.* 10*d.*, the value of the dollars so delivered up, was paid by Captain Trotter into the registry of the court, in the month of October, 1834, by direction of the lords commissioners of the treasury.

Under these circumstances the monition, as stated, was moved for on behalf of the crown, by

The *Queen's Advocate*, who submitted — That the primary title in all unclaimed property taken from the possession of convicted pirates was vested in the crown, *jure coronæ*; and although a derivative interest in such property had long since been granted by the crown to the Lord High Admirals of England, the extent of that interest was to be qualified by the terms in which the grant was set forth in the admiral's patent; that the general principle of law, in construing all grants from the crown, was that they should be construed strictly against the grantees, and this principle had been upheld more immediately in reference to the rights of Lord High Admirals, in the case of *The Rebeckah*, 1st Rob. p. 227. The question in that case was a question of interest in the capture of a vessel made from the island of Marçon, whether it should be condemned as a droit of admiralty, or to the captor. In the course of the judgment, Lord Stowell said, "The rights of the Lord High Admirals are of great antiquity and

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splendor, and are entitled to great attention and respect, and certainly to full as much in this court as in any other place where they [ \*425 ] can possibly come under consideration. \* At the same time, it is not to be understood that an extension of these rights beyond their absolute limits is to be favored by construction. All grants of the crown are to be construed strictly against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground, that the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that they are diminished by any grant, beyond what such grant, by necessary and unavoidable construction, shall take away." That for the purpose of applying this principle to the present case, it would be necessary to refer to the patent of his late majesty, William IV., the latest in point of date; the reciting clauses of that patent were in these words : —

(The *Queen's Advocate* here read the patent, and, in continuing his argument, observed,) — That although the words in the later patent, "goods and ships taken from pirates," might appear to suggest a more extensive grant of authority to the Lord Admiral than was to be found in the earlier patents, where the term used was "goods and chattels of pirates," yet, in examining the general tenor of the patent of Will. IV., it was obvious that no such distinction was intended to be made; that the term "taken from pirates" was clearly a misrecital, inasmuch that the patent itself purported to bestow upon his late majesty "all the rights and privileges granted to former Lord High Admirals," and whatever, therefore, was beyond these, could not be considered as legally within the intention of the [ \*426 ] grant; that if this view of the \*later patent was correct, the ancient doctrine of law which had been laid down in the earlier cases was still applicable in questions of this description; that the law so laid down by high legal authorities was this, "that the goods only of the pirates themselves passed to the Lord High Admiral, and that the crown shall have all piratical goods, that is, what goods are unclaimed, or the ownership is unknown. In support of this doctrine, the *Queen's Advocate* cited the case of *Prinston and others v. The Admiralty*, (3 Bulstrode, p. 147; 12 Coke, p. 73; and the case of *The Carabusa*, Ms. N.,) and having adverted to the facts of the case, he contended that, from the whole *res gestæ* of the case, it was to be inferred that the proceeds of the dollars in question were never at any time the proper goods of the convicted pirates; that although there was some reason to believe that they belonged, in

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point of fact, to Mr. Peabody, of New York, as suggested in the affidavits before the court, yet, inasmuch as no claim had been asserted on his behalf, or on behalf of any other, within the time limited by law, the just and legal conclusion was that they must be considered to fall within the description of "piratical goods, the ownership of which was unknown;" that as such they would escheat to the crown as *droits jure coronæ*, unless claimed within a year and a day after the monition should go forth; and upon this ground the crown, or the legal representative of the crown in this court, was entitled to the monition as prayed.

The motion was opposed on behalf of the crown, in its office of admiralty, by *Phillimore, A. A.*, who contended — That \*the present motion was the first instance in which such [ \* 427 ] a monition had been applied for, and that neither any book of authority nor the records of the court could furnish a precedent in its support. That the only condemnations of property to the crown, *jure coronæ*, known to the Court of Admiralty, were those of enemies' property under a prize commission, or of the property of others than enemies under the statute law, as having been engaged in trading in violation of particular acts of parliament. That even assuming, for the sake of the argument, that a proceeding in the present form was competent to be entertained against the property in question in the cause, the monition as it was now prayed was objectionable both in form and in substance, and looking to the grounds alleged in the act to found the monition, and to the tenor of monition itself, it could not be maintained in its present shape. That upon the face of the act it appeared that the right contended for on the part of the crown, was the right to goods belonging to other persons than the pirates who had been convicted. The monition as prayed, therefore, was inconsistent with such right, and upon this account was objectionable in point of substance. Again, the right in question, if maintainable at all, could only be maintained in this case upon the supposition that the property in question belonged to The Mexican, and upon this supposition it should have been alleged that it did so belong, and the monition should have gone out specifically against the owners of The Mexican and all persons claiming under them. That it was useless to pursue these objections further, inasmuch as it was clear from the ancient practice and constitution of \*the court, [ \* 428 ] that if the property in question could be proceeded against at all in the Court of Admiralty, it could only be proceeded against as pirates' property. Under this character, the legal result of the proceedings would be that it must pass to the crown as *droits of admiralty*. That the only case cited upon the other side which in any degree sus-

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tained the contrary doctrine, was the case of *The Carabusa*, and the circumstances of that were widely distinguishable from the present case, in this respect, that the persons charged with piracy, from whom the property had been taken, were never legally convicted as such. In that case, therefore, no proceedings were taken by the admiralty, for the reason that, in the absence of any conviction, or legal proof of piracy, the admiralty could not have sustained a right to the property as being the property of pirates. That the other cases which had been referred to by the Queen's Advocate, in no degree supported the position for which he was now contending.

The learned counsel here commented upon the cases of *Prinston, &c., &c.*, and in support of his opposition to the motion, cited the opinions of Sir Leoline Jenkyns (*Life of Sir L. J.*, vol. 2.) The case of *The Helena*, Ms. N. (*Comyn. Digest.*)

The court took time to consider the judgment, and upon the 3d August, the opinion of the court\* was delivered to the following effect:—

#### JUDGMENT.

DR. LUSHINGTON. As regulates to the ultimate disposal of the small sum of money in question in this case, I do not apprehend that the decision of the court can make any difference in the present instance. The question, however, which has been raised, involves a principle of considerable importance, and on this account it has, I conceive, been agitated, that no injurious precedent should be established for the future practice of the court in cases of this description. The facts which have given rise to this discussion, are shortly these. In 1832, an American vessel, named *The Mexican*, was plundered by a pirate schooner, *The Panda*. In 1833, Captain Trotter, of H. M. S. *Curlew*, captured *The Panda*, some of whose crew were taken at the time, but the greater portion of them effected their escape. In the same year, 1833, Captain Trotter succeeded in seizing the captain of *The Panda*, and three more of her crew, and eleven others were subsequently secured, one of whom was the mate. Six hundred and eighty-three Spanish dollars were found in the possession of the captain, and twenty-one dollars were afterwards delivered up as the property of the mate. The persons so captured were sent to the United States, and there tried for plundering *The Mexican*, and some of them being identified, were convicted and condemned as pirates. I do not find, in the proceedings in the American court of law, that any cognizance was taken of the particular dollars in question in this cause, and it is not probable that they should

have come under the notice of the court, as Captain Trotter had very properly paid the proceeds of them into the registry of this court, and they were never within the jurisdiction of the American tribunal. With respect to the true character of the property which has thus been taken from the possession of the pirates, the court is placed in some difficulty. \* There is no evidence before the court [ \* 430 ] to show that the dollars were ever in the strict sense of the term *bona piratarum*, or goods belonging to the pirates. On the other hand, there is no evidence that they are goods taken by the pirates piratically, and not belonging to them. It may be possible, it is even probable, that these dollars were a part of the plunder taken from The Mexican; but this is mere conjecture, and considering the lapse of time, seventeen months, which intervened between the plundering of The Mexican and the capture of the pirates, I cannot judicially assume them to have been a portion of the property embarked in The Mexican, or as belonging to the persons on board that vessel. It is also to be further noticed, that no demand has, up to the present moment, been made by any person claiming to have any right or title in them. Under these circumstances I have now to determine whether the proceeds of these dollars is to be considered as droits of the crown, or as droits of her Majesty in her office of admiralty. In considering this point, I have carefully examined the authorities which were cited when the case was argued at the bar, and I regret to say that they do not throw much light upon the question to be decided. With respect to the case of The Carabusa, no claim was made for the admiral at Malta, and Sir Herbert Jenner, the then Advocate-General, whose opinion was taken, (and I think that in a case of this kind I may refer to such an opinion,) does not state what the presumption of law might be in such a case as the present. He only adverts generally to the recognized distinctions between the property in goods strictly *bona piratarum*, and goods which might have \* belonged to other persons. There is also another circum- [ \* 431 ] stance in the case of The Carabusa, which deprives it of all authority as a precedent in this case, namely, that it was a case of joint capture, by French and English captors, and if the persons from whom the property was captured were pirates, they were never convicted as such. The circumstances, therefore, of that case, do not enable me to consider it as any guide for my judgment in the decision of the present question.

In the course of the argument, the court was also referred to the well known case reported by Lord Coke, and to that case I feel it necessary to make a further reference in the present instance. The case is reported in the 12th Coke, page 73, and the report of the case is to

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this effect: "In this very term the king referred the consideration of the letters patent of the Lord High Admiral of England to the two chief justices and the chief baron, whether by the letters patent the goods which pirates should take from others by robbery and piracy did pass to the Lord High Admiral or not? And upon the consideration of the said letters patent it appeared to us that thereby he had *bona et chatella piratarum*, and also *bona et chatella depredata*; *id est*, the goods robbed from others, which do not pass for two causes. 1st, If the king grant *bona et chatella felonum*, the patentee shall have the goods and chattels of the felon himself, or in which he hath property, but he shall not have the goods and chattels which the felon stealeth from others. 2dly, The goods taken from others the king cannot grant, for it appears by the statute 27 Edw. III. c. 8, s. 2., that the merchant so robbed shall be received to prove that the goods and chattels [ \* 432 ] belong \* to him, by his chart or cocket, or by other lawful proof of merchants, and the said goods shall be delivered without any suit at the common law." And the learned reporter then goes on to state: "But it was resolved that until such proof be made, the king may seize the said goods, for goods of which the property is unknown the king may seize, and if they are *bona peritura*, the king may sell them, and upon proof restore the value." Such in substance is the case referred to in Lord Coke; and although the earlier portion of the report, which it is difficult to understand, would seem to intimate that the Lord High Admiral was entitled to the *bona depredata* taken from the possession of pirates, the general result of the report, it appears to me, is simply to this extent: that the king may seize goods taken by pirates, when the property is unknown, and detain them till proof is made; but that no direct conversion passes to the crown, or the grantee of the crown in property taken from pirates, where the ownership is asserted or uncertain. This is clearly to be inferred from this further passage in the report: "And note, the statute does not limit the owner in case of depredation to any certain time to prove the property of the same goods, as ought to be in case of wreck." In these words expressly acknowledging the principle, that in piracy as well as felony, the taking away the goods cannot alter the title in the goods, nor can lapse of time convert the ownership, which remains in the original owner as if no such forcible abduction had ever taken place. The authority of this case, therefore, in my view of it, has no bearing upon the question which I am now called upon to determine. I must now [ \* 433 ] advert to another case \* to which my attention has been directed, namely, the case of *Prinston and others v. The Court of Admiralty*, a case of considerable importance upon this

subject, and which is reported in 3d<sup>d</sup> Bulstrode, p. 147. The report of the case is as follows: "Prohibition prayed to stay proceedings in the Court of Admiralty," and upon cause showed, the case appeared to be this: "That divers merchants sent out ships to sea, and they in their coming home did commit piracy, and the ships being here upon the river Thames, the admiral did seize them to have the goods as to him forfeited, having in his patent these words, '*bona piratarum.*' This he did, the ships being upon the river Thames, and so *infra corpus comitalis.*" It is here to be observed that in the case as thus stated, the words of the patent do not accord with the words of this patent, and certainly the case itself did not raise or suggest the present question, because the admiral could have had no right to the goods in question, for two reasons. 1st, He could not seize goods within the bounds of a county; and, 2dly, The property in question was the property of other persons. The opinion of all the judges on the words of the report was, "That he should not have these goods which the pirate had stolen from others, but only his own proper goods, and that the owners of the rest should have their goods to them restored again, if they came for them, and if they came not, then they were to be forfeited to the king." With respect to the first proposition in the decision of the learned judges, I apprehend, generally speaking, no one would offer any dissent, namely, that property stolen from other persons would be the property of those persons as soon as it was identified. It would be not a [ \* 434 ] little difficult to have foretold what reason Lord Coke would give for the doctrine laid down in the conclusion of the sentence. His reason is this: "*Quod non capit Christus capit fiscus.*" A reason which, notwithstanding the high authority of Lord Coke is, in my judgment, wholly unsatisfactory to support the proposition enunciated. The judgment of the court then proceeds to declare, "that the pirate ought to be attainted of piracy before the forfeiture of his own proper goods to the admiral; and so it shall be if one by the grant of the king is to have *bona felonum*; by these words he is not to have those goods which the felon hath stolen, but only his proper goods; but here the admiral ought not to sue for the goods to which he claims to be entitled, in his own court, but at the common law." Such is the case of *Prinston* and others, which ends here, and I must repeat, that great as is the authority of Lord Coke, he does not satisfy me upon any one proposition which is laid down in support of the decision in that case.

Without stopping to notice the case reported in *Parker's Reports*, which throws no light upon the subject under discussion, I now come



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to the opinion delivered by Sir Leoline Jenkyns, and I need scarcely observe that the authority of Sir Leoline Jenkyns is entitled to the greatest deference from all who sit in this chair. He says: "The ships and goods of pirates I do humbly conceive to be the Lord High Admiral's, as also all goods piratically taken from the king's subjects or friends, (the custody of them belonging to the Lord Admiral,) in case they be not claimed within the year." So that in the [ \* 435 ] opinion of Sir Leoline Jenkyns, the Lord \* High Admiral is entitled not merely to ships and goods, the property of the pirates themselves, but to all goods taken from pirates, if not claimed within the year. In one respect I cannot accede to the opinion thus expressed by this very eminent judge, namely, that the title of the original owner would be divested at the expiration of a year. The current of authorities is directly at variance with this opinion, and the doctrine of the law is expressly laid down to the contrary effect by Lord Coke; other authorities have been cited in the argument, and I have been furnished with the opinion of king's advocates and advocates of the admiralty, and what is the result? All the authorities decide that goods and property strictly belonging to pirates are droits of admiralty, and all the authorities, with the exception of Sir Leoline Jenkyns, determine, that goods found in the possession of pirates, and not their property, are not droits of admiralty. Upon these two points, with the single exception to which I have adverted, there is no difference of opinion, and I regret to say that, upon the particular question which has formed the subject of discussion in this case, the authorities are silent, and supply no information as to what is to be done when goods are found in the possession of pirates, and there is no proof either way as to whom they belong. What, then, is the legal presumption which I must entertain under the circumstances of the present case, and how is the grant to be construed in relation to those circumstances? Laying aside the fact that The Mexican had dollars on board at the time when she was plundered, (and I have already observed that this circumstance alone cannot lead [ \* 436 ] to the conclusion that the dollars in question in \* this cause were a part of the money so plundered,) the case resolves itself into a case simply of money found in the possession of pirates, without proof or presumption of the ownership being in any particular individual. How, then, is the grant to be construed with respect to this circumstance? The patent to the Lord High Admiral (I am now reading from that granted to his late majesty,) is in these terms, "goods and ships taken from pirates." That these terms are to be construed strictly cannot be doubted; this is the legal doctrine with

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respect to all grants from the crown, and it was expressly held to be so by Lord Stowell, in the case of *The Rebecca*, 1st R. A. R., but although the terms in question are to be strictly construed, they are not to be construed with that extraordinary strictness which would deprive them of all validity. Looking, then, at the terms of the grant, I am of opinion that the words, "ships and goods taken from pirates," cannot be more extensively considered than the words "*bona piratarum*." The question then reverts to this. What is the meaning of these words? Are all goods taken from pirates to be considered as belonging to the pirates themselves, unless the contrary be proved; or must the grantee, before he can establish a title in them, prove that the goods were the proper goods of the pirates? One circumstance may be mentioned as clearly essential to the validity of the Lord High Admiral's claim, namely, that the persons charged as being pirates should have been convicted; or where this is impossible, as in the case of the total destruction or escape of all the pirates, that there should be a judicial declaration that the property captured was the property of the pirates? The demand of the \*law [\* 437] in this respect is sufficiently satisfied in the present instance, by the fact that the pirates have been convicted by the legal tribunal in the United States, and I must consider that conviction as tantamount to a conviction in a criminal court of this country; the courts in both countries are equally courts of nations. In the absence, then, of all evidence to the contrary, and of all claims to the property in question, must I wait for affirmative proof in the present instance, that these dollars belonged to the pirates, before the claim of the admiral can attach? I apprehend not, and for this reason, that if it were so, the grant would be of little value; for all experience shows that in very few cases indeed could any such proof be supplied. In this view of the question I am supported by the opinion of the late Dr. Arnold, to which I will now advert; and in so doing I feel that, as far as the opinion of any individual who practices at the bar is entitled to any weight, there is, I am sure, no one to whom the whole bar and the profession generally would be disposed to pay greater deference than to the learned civilian in question. In the case of *The Helen*, he expressed himself clearly of opinion in favor of the right of the Lord High Admiral to certain property taken from pirates, which had been condemned at Malta, and to which no claim was asserted on behalf of the crown. The sentence was appealed to this court, and Lord Stowell decided in favor of the Lord High Admiral; and, as far as I am informed, nothing was said in the course of the proceedings as to the crown being entitled to any right *jure coronæ*. The circumstances of that case were closely similar with the pre-

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sent case, certain goods and moneys being found in the possession [\*438] of the pirates, without any proof or presumption to whom they originally belonged. If, therefore, the crown was possessed of the right which has been advanced in its behalf by the Queen's Advocate in this case, it had, I think, quite as good a pretence for advancing that right in the case of *The Helen*, as upon the present occasion.

Having thus far, in the investigation of this question, examined with great attention the authorities to which I have adverted, I am of opinion that I cannot safely assume any of them as a guide in forming my judgment in the present instance, still less can I deduce from them any general rule to be applied in future cases of this kind. As regards future cases that may occur, each case must depend upon its own circumstances, and if, in relation to the goods captured, there shall be a reasonable presumption that they could not be *bona piratarum*, or, in other words, the property of the pirates themselves, it will be the inclination of the court to hold that the admiral has no title in them. With respect to the circumstances of this particular case, it appears to me that the question stands in a different predicament from a question of mere merchandise. If it be difficult to identify goods, it would be almost impossible to identify money, more especially after the lapse of time that has intervened between the plunder of *The Mexican* and the capture of the pirates upon the present occasion. Confining myself, therefore, more immediately to the subject to which my decision must be directed in this case, I think that in the absence of all claim and of all proof or presumption to the contrary, and considering, moreover, that the sum of money in [\*439] question is not so great but that it might probably have belonged to the pirates themselves, it is my duty to pronounce that the dollars found in the possession of those pirates, is *bona piratarum*, and that the right of the Lord High Admiral attaches to it.

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## THE HARRIOT, Soutrice.

August 3, 1842.

Cause of salvage in the South Sea. Defence of the owners, that a custom exists in the South Sea fishery for vessels to render assistance to each other gratuitously. Issue directed to the Court of Common Pleas to try the existence of the alleged customs. Verdict found for the custom. Motion for for a new trial rejected.<sup>1</sup>

THIS was a case of salvage promoted by the master and part of the crew of a whaling vessel, "The Folkestone," for services rendered to another whaling vessel, The Harriot, both vessels being engaged at the time in the whaling fishery in the South Seas. The services of the asserted salvors were not denied, but the demand for salvage remuneration was disputed, upon the ground that a universally recognized custom existed in the South Sea fisheries for vessels engaged in the fishery to render mutual assistance to each other gratuitously in all cases of difficulty or danger.

The cause was originally argued upon the 2d session of Hilary term, 1841, by *Queen's Advocate* and *Addams*, for the salvors.

*Phillimore* and *Harding*, *contra*.

The court in an elaborate judgment having commented upon the custom in question, and the evidence in support of it, was of opinion that the custom, if duly established, was a legal and valid custom, but that the evidence adduced was not sufficient to enable the court to arrive at any satisfactory conclusion upon the question of fact, namely, the existence of the custom in question.

An issue was accordingly directed to the Court of Common Pleas, under the provision of the statute \*3 & 4 Vict. [\*440] c. 65, s. 11, in the following terms:—

Whether there was on the 2d day of November, 1838, a custom or usage among persons engaged in the South Sea whale fishery, whilst so engaged in the South Seas, that salvage should not be paid for "ordinary salvage services rendered by one ship to another?"

The issue was tried before Chief Justice Tindal, at the sittings in

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<sup>1</sup> [The Zephyr, 2 Hagg. Ad. R. 43; The Margaret, 2 Hagg. Ad. R. 48 (n); The Swan, 1 W. Rob. 70; The Ganges, 1 Notes of Cases, 87; The Trelawney, 4 C. Rob. 228.]

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Guildhall after Hilary term, 1842, and a verdict was returned in favor of the plaintiff, supporting the custom.

The court, upon the motion by the Queen's Advocate upon the 3d session of Trinity term, May 21st, 1842, having granted a rule *nisi*, to show cause why the verdict should not be entered for the defendant, or a new writ granted; the rule was now argued by—

*Phillimore, Thessiger, Q. C., and Harding*, for the plaintiffs.

*Queen's Advocate, Addams, and Willes*, for the defendant.

JUDGMENT.

DR. LUSHINGTON.<sup>1</sup> Considering that the question now submitted for the decision of the court is the first of the kind which has come before me, it is advisable to state the preliminary circumstances which led to its being discussed. The case came originally before [ \* 441 ] the court in the form of an ordinary suit for salvage. \* The defence to the suit was unusual, although not unprecedented. The services were not denied, but it was alleged that a custom existed in the South Sea trade that no salvage remuneration should be paid for services rendered by one whaling vessel to another. Two questions arose, one of law, the other of fact. Of fact, whether the custom was proved; of law, whether, if proved, it was a valid and a legal custom concluding the rights of all persons engaged in that fishery. As to the question of law, I addressed myself to that consideration first, and I came to the conclusion, that if such a custom was proved to exist, it would be a valid and legal custom. Having determined in favor of the legality of the custom, if established, it then became my duty to consider whether the custom was proved by the evidence then before me; the result was, that I felt it impossible to come to any conclusion upon the affidavits which were produced. If I could have satisfied my mind with respect to the existence of the custom, from the contents of these affidavits, although disposed to distrust my own opinion upon new and difficult questions, I should have felt most reluctant to put the parties to further expense; but looking to the great and growing importance of the trade, to the large amount of capital embarked in it, to the nature of the employment of the ships and crews, and to the description of the contract by which the latter

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<sup>1</sup> Having been prevented from attending the court when this judgment was delivered, the editor has been supplied with the above from the manuscript note of his learned friend, Dr. H. J. Nicholl, for which kindness he takes this opportunity of expressing his obligation.

are bound, as also to the considerations arising from the localities where the ships are employed in this vocation, I deemed it right that the question of fact should be submitted to the investigation of a court of common law, where the process of *vivâ voce* examination, and more especially the cross-examination of the witnesses, was best calculated to elucidate the \* truth. For this, amongst [ \* 442 ] other reasons, I directed an issue in the following terms:—

“ Whether there was, on the 2d of November, 1838, a custom or usage amongst persons engaged in the South Sea fishery, whilst so engaged in the South Seas, that salvage should not be paid for ordinary salvage services rendered by one vessel to another ? ” This issue was tried before Chief Justice Tindal, and the jury found a verdict in favor of the custom. This court has been moved to grant a new trial, and I must now advert to the principal arguments which have been urged in support of the motion by the learned counsel for the owners ; and I may here state that I should be most reluctant to grant a new trial, unless I was convinced that justice had not been done. The grounds upon which the learned counsel has relied in support of a new trial are shortly these: First, it has been said that the issue was not put to the jury in the same sense in which it was directed and intended by the court. This observation arises from the word “ ordinary,” and the comments of the chief justice on that word. Whether I did rightly or not in introducing the expression into the issue, most assuredly I did so advisedly and upon consideration, and by the word “ ordinary,” I did intend to use the term as distinguished from “ extraordinary,” thereby intending to include services of every day occurrence, and to exclude services which very rarely happen, and which entail upon the salvors not only a loss to themselves but also to the property of their owners. I was aware of the difficulty of attempting this limitation ; on the other hand, I was afraid of the risk of defeating justice ; I put the question so extensively that cases of extraordinary peril, loss, or \* suffering to the salvors might [ \* 443 ] be suggested, which would have the effect of misleading the jury as to the real and true question at issue. I may have erred in so doing, but it is due to truth to say that such was my intention in so wording the issue.

The chief justice was at first of opinion that the issue was intended to include every possible service, and that ordinary services meant the services which are allowed in ordinary cases. If the question had been so left to the jury, I should have had to regret that, by the use of an ambiguous term, I had misled the chief justice, and caused the question to be put to the jury in a different sense from what I intended. I am, however, relieved from this difficulty in the

present instance, by the wise precaution of the chief justice, who put the question to the jury in both ways; as a custom negating all services of salvage, and as negating only common and ordinary services. Consequently, the issue was put to the jury in the sense intended by this court; and I therefore see no ground of reason for granting a new trial, upon the ground of the objection to which I have thus far adverted. True it is, that the question was also put to the jury in a more extended sense; and the jury found for the plaintiff, declaring, through their foreman, that they made no distinction between ordinary and extraordinary services. Is this verdict affected by the circumstance, that the jury took into their consideration the more extended custom? I think that it is not affected by such circumstance. The jury have found that the evidence supports the narrower issue; and their apprehension that the evidence would justify them in going further, does not [ \* 444 ] show that they were not right in going as far \* as they did.

I was desirous to be satisfied of the truth of a limited proposition. The jury say it is true; and, further, that it may be true without the limitation. Surely this furnishes no ground to say that the jury have miscarried, as to the limited proposition. Many cases may be supposed, in which it might be the duty of the court to direct an issue, and where the jury might be satisfied that, to the extent the issue went, the facts were to be found in the affirmative, and, at the same time, might think that the issue itself might have been directed in a more comprehensive form. If my attention is confined to the record alone, I find nothing more than that the jury found for the plaintiff; if I look to the notes of the chief justice, I find that the question was put in both senses; and the utmost that I can say is, that, in the opinion of the jury, the evidence of fact would support not only the issue which was put to them, but even more than the issue. Perhaps the jury might be right in their view of the case; and the evidence given, and which was wholly unopposed, might reasonably justify their opinion (for it was not their verdict but their opinion) that no salvage reward, under any circumstances, was customarily paid or demanded for salvage services between South Sea whaling vessels in the South Seas. It does not appear to me that the finding of the jury is any degree prejudiced by such opinion. As to the legality of so large a custom, I have pronounced no opinion upon it. I have never said whether a custom that all salvage services, rendered by South Sea whalers in the South Seas, should be unrewarded, supposing such a custom to exist, is a legal custom or otherwise. I have had no reason to pronounce [ \* 445 ] an opinion upon that point, and, if I \* had done so, I

should have gone beyond the circumstances of the case, and it would have been imprudent for the court to have hazarded a legal opinion when it was unnecessary. It has been said that the jury have found an illegal custom, a custom not supported by the facts of the case or founded in law, if it does exist; and that the court cannot reject a part of the finding and take a part only. The answer to this objection is, that the jury have done no such thing; they have found no such extended and illegal custom, if illegal it be. They have only expressed their opinion that the facts would have warranted them in going further than the issue; and in receiving their verdict, accompanied by such opinion, I am not bound to incorporate their reasons with their verdict. Neither am I at liberty to hold that their verdict is bad, because in their opinion, if necessary, they would have been disposed to find in favor of the broader proposition. I therefore see no reason for granting a new trial upon this finding of the jury. It may often happen that, in finding a verdict, a jury may entertain opinions which would carry them beyond that verdict, if their opinions were known and scrutinized. The case of *Finch v. Rawling*, 2 H. Blackstone, p. 393, which has been cited in the argument, is not exactly in point. In that case two separate customs were pleaded by the defendants, and one custom was found to be good in law, and the other to be invalid; and the illegality of the custom set up by one of the defendants did not prejudice the validity of the custom set up by the other. The jury found a verdict for one defendant upon the first special plea, and for the plaintiff, against the other defendant, on the general issue. The first special \*plea was, that all the inhabitants of a parish had the right [ \*446 ] of playing at all kinds of lawful games in the close of the plaintiff; the other plea was, that all the world had a similar right. The same jury found both issues.

I now proceed to the last ground upon which a new trial has been asked, namely, that the verdict is not supported by the evidence. The first answer to this is, that the chief justice was not dissatisfied with the verdict. I have spoken with the chief justice, and I am justified in saying that he was not dissatisfied with the verdict. What is the necessary import of this? Why that he thought there was sufficient legal evidence to warrant the jury in deciding for the custom upon that evidence. Ought I to be satisfied with this, or has sufficient reason been laid before me to induce me to arrive at a different conclusion? It is not necessary to enter minutely into the details of the evidence. The question proposed to the jury was a question of mercantile usage, in a trade of no great antiquity. I find, on behalf of the plaintiffs, evidence of persons engaged in that



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trade deposing that, within their knowledge, no such claim for salvage remuneration had ever been preferred. Such evidence, perhaps, standing alone, would not have been sufficient; but I also find evidence of salvage services proved to have been rendered by one whaling vessel to another, of such a kind that there can be no doubt a claim for salvage remuneration would have been successfully preferred, in this or other courts, if there were no legal objection to their being discussed. This is a very important fact, or I should rather say these are important facts; although I must admit that [ \* 447 ] the evidence is not so \* full and complete as might have been expected. On the other side, I find the defendants producing no evidence at all, although it is admitted that some cases have and must have occurred. Hence I must infer that there is no case whatever in which salvage remuneration has been demanded and paid; and, considering that this trade has existed for a period of sixty years, this circumstance alone is a very important ingredient in a question of fact. It appears to me to be scarcely possible, considering the immense number of vessels engaged in this trade, that some such demand should not have been preferred, unless it were generally understood that it could not be successfully maintained; or, in other words, that a custom to the contrary was in existence. I am not, therefore, dissatisfied with the verdict, and I see no ground for believing that a new trial would produce any further elucidation of the case. The defendant, it appears to me, has no ground for the application he has made. It could not be that he would produce any such evidence; because he has voluntarily waived his opportunity of doing so, by declining to produce any upon the former occasion. If he could have done so, he would have done it then. For all these reasons, then, not forgetting that it is my duty to avoid leading the parties into expense, I must decline to grant a new trial. I need not, I apprehend, say a word as to directing the verdict to be entered for the defendant. This is most clearly a case in which I could not do so. With respect to the costs, although as a general rule costs should follow the event of the case, yet considering that the question in this case is the first of the kind that has arisen in this court, I shall make no order as to costs.

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The Mary. 1 W. Rob.

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\* THE MARY, Blossse.<sup>1</sup>

[ \* 448 ]

November 4, 1842.

Cause of salvage. Master and part of the crew captured by pirates. Vessel carried into harbor by the salvors. An expedition subsequently undertaken by salvors against the pirates. Such expedition not in the nature of a salvage service. 30*l.* awarded to the salvors.

THIS was a cause of salvage promoted by the master, owner, and crew of The Hero, and the charterer, the master, and crew of the ships Mundane and Whitby, for services rendered to The Mary, a whaling vessel, under the following unusual circumstances.

The act on petition of the salvors in substance set forth, "that about 3 P. M. of the 29th December, 1839, The Hero, Whitby, and Mundane, being in the harbor of Ampannan, in the island of Lambock, in the South Pacific Ocean, a vessel was seen in the offing with a signal of distress, and which for some time previous had been heard firing guns at intervals. That Captains O. and W. in the gig of The Whitby, and Captains M. and S. in The Hero's boat, immediately proceeded to the said vessel, which they boarded, when the said vessel was given in charge to Captain O., and brought to anchor in Ampannan Roads. That at the time the vessel was so boarded by the salvors, only a part of the crew were on board, and the ship was in charge of the first mate, from whose statement it appeared, that all the rest of the crew, the master included, having gone on shore to cut wood at North Island, distant about twenty miles from Ampannan, had been taken and was believed to have been murdered by pirates, with the exception of the carpenter's mate, who had escaped by swimming to the ship, then about five miles from the shore. That upon anchoring The Mary, a consultation was held by the salvors with a Captain King, the only European resident upon the island of Lambock, and it was determined to arm and \* man The Mary, and proceed to North Island for the [ \* 449 ] purpose of rescuing the master and crew, if they should be still living. That whilst the necessary preparations were being made, at about half-past 4 P. M., a whale boat was seen making for the vessel, and which, upon coming up, proved to be one of The Mary's boats, with the third mate, Cooper, and three seamen, bringing in-

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<sup>1</sup> [ 2 Notes of Cases, 27. ]

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telligence that the master and rest of the crew who had been seized by the pirates were alive, and bearing a note from the master, requesting that fifty muskets and six kegs of powder, and some calico and pocket handkerchiefs, should be sent as a ransom for himself and the others, and stating that if such request was not quickly complied with, all hands would be murdered. That Captain S. and five of The Hero's crew, with two long six-pounders and small arms, Captain W. and five of The Whitby's crew, with three twelve-pound caronades and small arms, Captain M. and five of The Mundane's crew, with small arms, and Captain King, with two long four-pounders, and sixty natives with muskets, then boarded the Mary, which at half-past 10 P. M. weighed anchor and set sail for North Island; the schooner Monkey, belonging to Captain King, following, prepared for action, but with directions to keep some distance astern, in order that the pirates might not see her until the Mary's crew had been rescued. That on the arrival of The Mary off North Island, the stipulated ransom was delivered, and the pirates having permitted the master and all hands to return to the vessel, with the exception of the carpenter, cooper's mate, and a boy, whom they persisted in detaining, an attack was commenced upon the pirates, but

[ \* 450 ] the night coming on, they effected their \*escape. That The

Mary then sailed for the Twin Islands, a common haunt of pirates, distant about sixty miles, which they reached at daylight on the morning of the 31st of December, and found there several proas, upon which they commenced an immediate attack. That after a lengthened resistance, during which many of the pirates were killed and wounded, the rest of the pirates escaped in their proas to Sum-bawa, and The Mary returned to Ampannan, where she arrived and was moored in safety on the 4th of January following."

For the salvors, *Queen's Advocate* and *Addams* contended— That a salvage service of importance had been rendered by the salvors, in the first instance, in carrying the vessel in safety into the harbor of Ampannan. That the signal of distress which was hoisted at the time, clearly denoted that in the opinion of the persons on board The Mary, she stood in need of assistance, and this opinion was borne out by the fact that she was deprived of her proper complement of hands on board, and was in charge only of the first mate, who could neither read nor write, and who, in common with the rest of the crew, were entirely ignorant of the locality. That the entrance to the harbor of Ampannan was both dangerous and difficult, the mouth being crossed by a ledge of rocks, and if the vessel had attempted to enter without assistance, in all probability she would have run upon these

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rocks and been wrecked. That if she had remained outside the harbor, she would, under the circumstances of the case, have been equally exposed to danger, inasmuch that at the time the salvors went on board, \* she was drifting through the straits [ \* 451 ] of Lombock, and by the force of the current would soon have been carried out to sea, in which case she would have been exposed to the twofold danger, either of again falling into the hands of the pirates, or of being wholly lost. That much risk and considerable expense had been incurred in the preparation for the attack upon the pirates, and although *per se* the rescue of the master and his men would not perhaps have sustained a claim for a salvage remuneration, yet in the present instance, this circumstance, taken as it should be in connection with the preservation of the owner's property, formed a material ingredient in the salvors' case, as enhancing the value and the merit of the service which had been performed.

For the owners, *Jenner and Bayford*, *contra*, submitted — That the expedition against the pirates had been concerted between the alleged salvors and Captain King prior to the arrival of *The Mary* in the offing, and for this purpose *The Monkey* schooner had been already equipped and fitted out, principally at the expense of Captain King. If, therefore, any remuneration was due upon the ground of expenses incurred in the attack upon the pirates, it was chiefly due to Captain King; and that gentleman, in a letter to the owners of *The Mary*, had expressly disclaimed any intention of claiming as a salvor. With respect to the attack itself, it was in a great measure unsuccessful in the result, the greater portion of the pirates having succeeded in effecting their escape; and as regarded the release of the captain and his fellow captives, it was altogether unnecessary, the release \* of those persons having been already secured by the pay- [ \* 452 ] ment of the ransom stipulated upon with the pirates; that, even if the attack had been completely successful, and the rescue and preservation of the captives had been entirely attributable to this success, it would, under the circumstances of the case, have furnished no foundation for a claim to salvage reward, the ship never having been in danger, nor in need of salvage assistance. Lastly, that the signal which was hoisted when the vessel was first seen was a signal for assistance and advice, solely in reference to the captivity of the master and the other men, and not for any assistance in the navigation of the ship, the mate and the crew who were left on board being amply sufficient and competent for her safety.

The court, having adverted generally to the facts of the case, observed — “Upon the facts of this case, two questions arise; first, what was the true character and extent of the service which was ren-

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dered by the salvors at the time the vessel was first anchored in the harbor of Ampannan; and secondly, how far was this original service affected by what was done afterwards in the expedition which was undertaken against the pirates in North Island and elsewhere? Upon the first point, I am of opinion that, in conducting the vessel into the harbor, a service in the nature of a salvage service was performed, and for this reason, that the salvors were induced to go out to her assistance in the first instance by the signal of distress and the firing of the guns; and also because the ship was deprived of her proper complement of hands, and the persons who were left in charge of her were ignorant of the locality. A discussion was raised [ \* 453 ] in the argument \* as to the signal of distress, and the firing of the guns; *quo animo*, the former was hoisted, and the guns were fired; and on behalf of the owners it was contended that they had no reference to the navigation of the vessel, but were solely intended as measures for procuring assistance and advice for the rescue of Captain Blossie and his crew from their captivity with the pirates. It is unnecessary to inquire, in the present instance, whether this be a correct representation or not; and if the inquiry were necessary, it would, after this lapse of time, be a matter of no small difficulty to ascertain what were the precise views and intentions which the parties entertained at the time. Whatever might be the motives of the persons on board The Mary, in making the signals, it is obvious that their motives could not be understood by the persons in the harbor; and in going out to The Mary they must be assumed to have gone out for the purpose of rendering some assistance, although they did not precisely know the exigency in which the vessel was placed. For these reasons, therefore, I think that the service of the salvors was a salvage service at the commencement. The extent of this service is the next point to be considered. On the part of the salvors it has been urged that it was a service of considerable importance, as involving the preservation of the ship and cargo; and in support of this assertion, two reasons have been assigned. In the first place, it has been said that the mate, who was the chief officer in charge of the vessel, could neither read, write, nor keep his log, and that he was altogether incompetent to the safe navigation of the ship.

This assertion has been directly controverted on the other [ \* 454 ] side; and looking \* to the probabilities alone, I must confess that I am unable to give full credence to such an assertion in the present instance. It is contrary to all probability that the owners of a ship of this value and occupation should take a person on board, as chief mate, who was so entirely destitute of every qualification for the discharge of his duties. That he was entirely ignorant of the locality may be readily conceived, as it does not appear

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that the vessel had touched at Ampannan previous to this transaction. In this respect it is possible, nay, even probable, that he might have been incompetent to conduct The Mary into the harbor in safety without assistance, but this assistance would be confined to that description of aid which is ordinarily required by a master of a vessel coming off a port with which he is not well acquainted, and resorting to the experience of a pilot, or some other person possessed of local knowledge. The second reason upon which the counsel for the salvors have relied in support of this assertion, is, the danger to which the vessel was exposed from the deficiency of hands on board; and here again I must confess that the facts of the case, in my view of them, do not support the conclusion which has been drawn from them.

"The original number of hands on board The Mary, it appears, consisted of twenty-eight persons; and although, by the capture of the master and the others, this number had been reduced to fourteen when The Mary was first observed in the offing, the subsequent return of the third mate and his companions made up a complement of nineteen hands on board when she was taken into the harbor. Looking at the tonnage of The Mary, and considering that she had sustained no damage, I cannot \* but think that the nine- [ \* 455 ] teen hands on board her were fully adequate to her safe conduct under ordinary circumstances, and it is not to be left out of the consideration that the weather at the time was favorable.

"Upon this part of the case, then, I am of opinion that the service which was rendered by the salvors in conducting this vessel into the harbor of Ampannan, although in its nature it is to be regarded as a salvage service, is one of no great magnitude or merit. It occupied but a very short period of time, probably not more than two hours and a half in its duration, and was attended with no risk, and no great exertion to the salvors; and if the claim of the salvors rested here, unconnected with any service which was rendered afterwards, separate or combined with it, the service in question would be amply rewarded by a very moderate remuneration. It remains to be now considered, in the last place, how far this service was affected by the transactions which subsequently occurred.

"Now taking into my consideration all the circumstances which are stated to have taken place after this vessel was first brought to anchor in the harbor of Ampannan, I cannot accede to the conclusion that the subsequent attack which was made upon the pirates was either necessary or that it was primarily intended for the recovery of Captain Blossé and the rest of the crew, and for these reasons: that the ransom which had been demanded was actually sent for the pur-

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The Mary. 1 W. Rob.

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pose of peaceably obtaining the restoration of the master and his men, and it could not be contended that the force went with the view of compelling the Malays to accept the ransom, because, if [ \* 456 ] the salvors had the power \* to do that, they had power to rescue the prisoners without any ransom at all. It is, moreover, clear that no such intention was entertained, because it is stated in the act on petition that the vessel of Captain King was prepared for action, and that he gave directions to keep her some distance astern, in order that the pirates might not see her till the crew of The Mary had been rescued by ransom, and not by force or intimidation; and in point of fact the men were restored to liberty by the sacrifice of property, not by any act done by the salvors. I think, therefore, that it is impossible to hold that any part of the ulterior expedition was in any measure connected with the rescuing of the cargo or crew of The Mary. It was a common union for the purpose of inflicting punishment on the pirates, and not with a view to the benefit of The Mary, her cargo, or her crew. In this view of it, I must hold that every thing done subsequently to the 29th of December is not of the nature of a salvage service, and consequently that the original service is in no degree affected by it. I might stay my remarks here, but before I conclude I think it right to add that, even assuming that the subsequent expedition of the salvors had been undertaken solely for the rescue of the master and crew of The Mary, that the attempt had been perfectly successful, and that the restoration of the captured persons to liberty had been entirely owing to such success; still, The Mary having been safely anchored in harbor, I am at a loss to conceive upon what principle I could have considered such an expedition in the character of a salvage service. Supposing that in time of war a French cruiser had captured a British merchantman, and [ \* 457 ] having taken out the \* master and some of the seamen, had then left her with the remainder of the crew on board, and that another British vessel had come up and rendered her assistance because of the deficiency of the crew, and had afterwards captured the French vessel with the master and seamen, could it be contended that the capture of the French vessel, and the restoration of the master and his men, was a salvage service, or entitled to a salvage remuneration? Impossible. I have felt it my duty to make this observation, that we may never lose sight of the principle upon which alone a salvage service can be founded, namely, a rescuing of a ship and cargo from some impending danger or distress.

“Under all the circumstances of the case, I think that I should do ample justice to the salvors in awarding them the sum of 30*l.*, and as no tender has been made, of course with the costs.”

THE OCEAN QUEEN.<sup>1</sup>

January, 1842. .

Motion under the statute 3 & 4 Vict. to arrest a Nova Scotia vessel, the vessel having been built and registered at New Brunswick. Motion rejected; such vessel not being a foreign sea-going vessel within the provision of the sixth section of the act.

In this case the court was moved to issue its warrant of arrest against a vessel built and registered in New Brunswick, under the provision of the 6th section of the statute 3 & 4 Vict. c. 65.

The affidavit to lead the motion set forth that, in the beginning of June last, The Ocean Queen arrived in the river Mississippi, for the purpose of obtaining a cargo on freight. That R. L., the master, left his ship in the said river, and proceeded to [ \* 458 ] New Orleans for the purpose of ascertaining if a freight could be procured. That he was there introduced to the firm of Lizardi & Co., the agents of Lloyd's, for advice and assistance. That the master in his communications with the said firm on the said occasion informed them that the said ship was built and registered at New Brunswick, and that C. S. and R. L., of Liverpool, in Nova Scotia, merchants, were the owners thereof. That finding the ship had on board a parcel of goods which rendered her liable to seizure and confiscation in an American port, Lizardi & Co. advised the master to proceed to sea at once, but he declared himself unable to do so for want of funds to pay the charges of obtaining provisions and other necessaries to fit his said vessel for sea, and that neither he nor his owners had any credit or correspondents at New Orleans. That under these circumstances the firm of L. & Co. were induced at the master's request to advance the necessary money to enable him to pay the said expenses of fitting and getting his vessel to sea, and the same, with the usual commission thereon, amounted to the sum of two hundred and fifty pounds, for which he, the master, drew a bill of exchange upon his owners, payable in London at sixty days after sight. That the said bill was duly presented for payment at the counting-house of the owners at Liverpool, in Nova Scotia, but that they refused and still refuse to pay the same. That the ship had

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<sup>1</sup> [S. C. 1 Notes of Cases, 271.] This case having been inadvertently omitted in the former number of the Reports, the editor has here inserted it, although out of its proper order in point of time.



arrived in the port of London for the purpose of being sold for the benefit of the owners, &c., &c.

[ \* 459 ] \* In support of the motion, *Addams* submitted — That in questions of bottomry, the ports of Nova Scotia and New Brunswick had always been considered as foreign ports, for the purpose of giving a validity to the execution of bonds executed therein, and the principle upon which this had been done was fairly to be applied under the circumstances of the present case. That even looking to the particular wording of the sixth section of the recent act of parliament, 3 & 4 Vict. c. 65, it was obvious that the words of the section in question fully authorized the court to issue the warrant of arrest as prayed in the present instance. The words of the sixth section were these: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship or sea-going vessel," &c. That each of the expressions, foreign ship or sea-going vessel, must be susceptible of some peculiar and proper signification, otherwise the latter words, sea-going vessel, would be a mere surplusage and absurdity, because every foreign ship which may arrive in a port of this country must *ex necessitate* be a sea-going vessel. That the two terms, moreover, were expressly disconnected by the use of the disjunctive particle "or." This must be presumed to have been done advisedly by the legislature in framing the sixth section of the act, and most clearly denoted that it was and is the intention of the act to give to each a distinct and separate meaning. Lastly, that the peculiar circumstances of the case strongly entitled the party making this

[ \* 460 ] \* application to the assistance of the court, the money having been *bonâ fide* advanced in a case of great emergency to the vessel, and in which, but for such advances, she would in all probability have been confiscated.

#### PER CURIAM.

I should be much disposed to allow the process of the court to issue as prayed, if I could satisfy my mind that I had authority to do so in the present instance. The following difficulty, however, suggests itself, namely, that the ship was built and registered in New Brunswick, and is, it appears, still the property of a mercantile firm in Nova Scotia. Under these circumstance it is impossible, I think, to consider it as a foreign sea-going ship or vessel within the provision of the statute upon which this motion has been founded. The

learned counsel by whom the motion has been made has endeavored to obviate this difficulty by suggesting that the words "foreign ship" in the sixth section of the statute in question have no connection with the words that immediately follow, namely, "or sea-going vessel." On the contrary, he has contended that the terms themselves are expressly disconnected in the wording of the act by the particle "or," and that it must be presumed that the two expressions were intended to convey a distinct and appropriate meaning. If this were the true construction of the words, that the section in question was intended to give to this court a jurisdiction with respect to necessities furnished to "any sea-going vessel," there would be no difficulty in the case, for this vessel is clearly a sea-going vessel.

I must confess, however, that I entertain a \*considerable [ \* 461 ] difficulty in conceiving that the legislature ever intended to confer upon the court so extensive and extraordinary a power. What would be the effect of putting such a construction upon the provision of the sixth section? It would be this, that every vessel fitted out in the port of London would be liable to be arrested under the process of the court, for the purpose of enforcing against it in this court any demand on account of necessities supplied. Looking at the decisions in the courts of common law upon this subject, and at the great jealousy which has been universally manifested against the introduction of the general maritime law for the purpose of enforcing demands of this description, I cannot think that in the present instance I should be warranted in adopting such a construction of the statute. With respect to the argument, that in cases of bottomry bonds executed in the ports of Nova Scotia and New Brunswick, have been considered as executed in foreign ports, so as to give a due effect and validity to the execution of such bonds, it is to be observed that the policy of the law has uniformly extended a great latitude of construction upon this class of instruments, and the same consideration does not apply to the construction of the statute which has been referred to. I must reject this motion.

Motion rejected.

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Vessel (name unknown.) 1 W. Rob.

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\* VESSEL (name unknown.)<sup>1</sup>

November 4, 1842.

Application for head-money for the capture and destruction of one hundred pirates, fifty-two of whom had been actually killed or taken by the parties making the application, the remaining forty-eight being supposed to have been murdered by the inhabitants of the coast, after they had made their escape in the first instance by swimming ashore. 20*l.* per man awarded for the fifty-two. Motion rejected as to the others. *Seem*, the words taken or killed of the act 6 Geo. IV. c. 49, imply that the capture or destruction should be effected by the parties applying for the bounty.

In this case an application was made to the court to decree a bounty for the destruction of a piratical junk and her crew under the following circumstances:

[ \*462 ] \* It appeared from the affidavit to lead the decree, that H. M. ship *Pylades*, whilst at anchor in the China seas, descried three piratical junks close in with the shore. That an attack was made upon the said junks by the boats of *The Pylades*, and after a short engagement one of the junks was boarded and taken, and the remaining two junks escaped. That fifty of the crew of the captured junk were found dead after the action, and two more were taken alive, the rest of the crew having escaped by jumping overboard and swimming ashore. It was further stated in the affidavit, that the captain of *The Pylades*, on the following morning, was visited by some of the inhabitants of the coast where the action had taken place, and they informed him that several of the pirates who had jumped overboard had been destroyed by the inhabitants upon their making the shore, and that the complement of hands on board each of the junks was at least one hundred and eleven men.

Under these circumstances, *Addams* moved the court to decree a bounty to be due for the capture and destruction of one hundred men, under the provisions of the statute 6 Geo. IV. c. 69.

The application was opposed by the *Queen's Advocate*, upon the ground that there was no sufficient evidence before the court of the destruction of the forty-eight men who were alleged to have jumped overboard and swam ashore.

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The Shannon. 1 W. Rob.

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The court decreed 20*l.* per head for the fifty-two men found on board the junk after the action, but declined to make any order with respect to the remaining forty-eight pirates; observing, that the words of the act, taken, secured, or killed, \* obviously [ \* 463 ] meant taken or killed by the persons applying for the bounty; they could not therefore extend to the circumstances of this case.

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THE SHANNON, Higginson.

November 14, 1842.

Cross-action in a cause of damage by collision. Case heard before Trinity Masters. Collision the effect of inevitable accident. Both actions dismissed.

THIS was a cause of damage by collision, promoted by the owner of the brig *Placidia* against the steam-ship *Shannon*, her tackle, apparel, &c. The proceedings were by plea and proof, and the case was heard before Trinity Masters.

The libel on behalf of *The Placidia*, in substance, pleaded — That at half-past seven, P. M., of the 13th of October, 1841, *The Placidia*, bound from London to Seaham, in ballast, was proceeding down Sea Reach on the starboard tack, about three miles above the Nore Light, with the wind south-west by south, blowing a fresh breeze, and a flood tide, her head lying south-east by east. That the said brig had all her sails except studding-sails set, and was running free in about mid-channel at the rate of about five or six knots, the night being clear, though dark, and keeping a good look-out, when the mate of the brig observed a light about three points on the lee bow, as of a steam-vessel coming up Sea Reach, at the distance of about two miles. That expecting the steamer would pass to leeward of the brig, the brig was kept steady in her course until just prior to the collision. That the steamer was going at the rate of about nine or ten knots an hour, and never eased her engines, but came right down upon the brig, turning her completely round on the other tack, and striking her on the larboard \* bow with her star- [ \* 464 ] board bow. That as soon as the hull of the steamer was visible, and just previous to the collision, the master of the brig, perceiving a collision to be inevitable, let go the fore braces and caused the helm to be put hard a-lee, in order to deaden the ship's way and thereby ease the blow. That the master and crew of the brig, im-

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The Shannon. 1 W. Rob.

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mediately after the collision had taken place, hailed the steam-vessel, and called out that the brig was stove to the water's edge, and requesting assistance, or that the name of the steamer should be given, but that no answer was returned, and the steamer having in a short time got clear of the brig continued her voyage. That the damage was occasioned by the fault of the steamer in not having a good look-out, &c., &c.

A cross-action was entered on behalf of The Shannon, and an allegation was brought in, pleading — That at the time of the collision The Shannon was preparing to anchor, it not being deemed expedient to proceed further on her voyage on account of the darkness of the night. That the engines had been stopped and the steam was blowing off, and The Shannon was just coming round to the flood-tide, her head at the time bearing her compass south-west. That while so rounding, The Placidia was observed running down with the wind. That the master and mate and all hands on board The Shannon hailed The Placidia as loud as they could, but received no answer, and The Placidia continued her course until close upon and too near to clear the steamer, when she altered her course by sud-

denly putting her helm a-port, but almost at the same in-  
[ \* 465 ] stant struck the steamer on her starboard bow, doing \* her material damage. The allegation then further averred —

That a good look-out was kept on board The Shannon at the time; that the steamer had three brilliant lights burning, one at the mast-head, and one at each of the bows; that the wind was blowing at the time west-south-west, and the brig had the wind free, and that the accident was occasioned by the persons on board the brig.

The case was argued by

*Haggard and Robinson*, for the owners of The Placidia.

*Queen's Advocate and Addams*, for the owner of The Shannon.

#### JUDGMENT.

DR. LUSHINGTON. In this case actions have been brought on behalf of both these vessels; in other words, it is averred on the part of each vessel that the collision was occasioned by, and that the sole blame is to be imputed to the other. You, gentlemen, (addressing the Trinity Masters,) will have to decide the following questions: — First, whether The Shannon was or was not to blame; secondly, whether any blame at all is to be imputed to The Placidia, against which vessel a second action is brought. There is also a third question incidental to this class of cases, namely, whether the collision

was occasioned by inevitable accident,—in which case, of course, neither party is to blame, and each must bear its own loss. There are not many facts in the case which I think necessary to bring to your particular notice, but I feel bound to observe that the evidence in the cause is not altogether of so direct a character and description that we \*can arrive at a satisfactory conclusion, [ \*466 ] without bestowing much investigation and mature consideration upon it. Our judgment must be governed by the result of that investigation ; and in order to be just and true, the decision must be conformable to the evidence in the case ; that as far as possible those interested in the cause, and the public in general, may know the grounds upon which the case is decided. In order to simplify the case, I will now direct your consideration to the different courses the two vessels were pursuing, and upon this part of the case there is no material difference in the two statements. The course of the brig is described to have been south-east by east, the wind blowing a fresh breeze from south west by south. It has been argued on the behalf of The Shannon that the brig's true course ought to have been east-south-east. It has also been represented that there was a difference of a point or two in the quarter of the wind between the real truth of the case and the statement set up by The Placidia. It is, however, an admitted fact upon both sides, that the brig was going free.

With regard to the course of The Shannon, it appears by the evidence and the exhibit annexed to the allegation, that her course was north-west, that she had run up about five miles above the Nore Light, when the engines were eased, the helm put to starboard, and the head of the vessel brought round to the south, at which time the brig was seen coming down the river with the wind free. Now, as The Shannon was proceeding up the river, I presume that if the two vessels had continued their respective courses, without any alteration on the part of The Shannon, they would \*have [ \*467 ] been coming end on, and in that case it would have been the duty of The Shannon to go to leeward of the brig, and the two vessels to pass on the larboard side of each other.

The respective statements of the two vessels as to the courses they were pursuing being as I have stated, the whole question, in my opinion, subject to your better judgment and experience, depends upon this one point,—whether the steamer put her helm to starboard before or after seeing the brig. We may, I think, lay out of our consideration any imputation of neglect in not keeping a good look-out on board The Shannon. If The Shannon perceived the brig coming down the river before she had adopted these measures for anchoring, she ought, I apprehend, to have ported her helm and gone

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The Shannon. 1 W. Rob.

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to the north of the brig. If, on the other hand, she had already put her helm to starboard, and had brought her head to the south before she saw The Placidia, and if at this moment her engines were eased, in such case it would not, I conceive, have been a prudent measure for her to port her helm in order to bring her head back again towards the north. I have now stated to you, as clearly as I can, my own notion of what ought to have been done. I must now proceed to call to your attention the facts of the case as they are disclosed in the evidence, and from these facts, I again repeat, neither you nor I am at liberty to depart.

What, then, was the state of The Shannon when she first saw The Placidia coming down the river? With regard to the evidence on this point, I regret to say that it is not so clear as I could have wished it to have been, whether I look to it in chief, or in [ \* 468 ] \* the cross-examination of the witnesses. Higginson, the master of The Shannon, says, "I ordered the helm to be put to starboard, which was done, and The Shannon's head was thereby brought round to the southward; at this time (and here rises the great difficulty) I perceived a vessel coming down upon us with the wind free, and I went unto our starboard paddle-box to hail her, at the same time I gave an order 'to stop our engines.'" Now, whether he meant that he saw the brig after he gave the orders to starboard the helm and to stop the engines, does not clearly appear. Upon the sixth interrogatory he again says, "It was not so dark as to prevent the brig from being seen until after the collision. We saw the brig for several minutes before she struck us. She was about half a mile off when we first saw her." There is an obvious discrepancy in the two statements of this witness as to the distance when The Placidia, was first perceived; but it would be contrary to the usual practice in these cases to bind the witnesses down to precise words, more especially as regarding distances at night, which it is impossible to state with any certainty or precision. Without imputing, therefore, to this witness any intentional falsehood in his evidence, what is the result of this testimony as regards the fact whether The Shannon had made preparations for anchoring or not before she first perceived The Placidia? Why, upon this point he leaves the question undetermined. He has sworn, it is true, that The Shannon, before she saw the brig, was preparing to anchor, but unfortunately he does not inform the court what means had actually been taken for so doing, [ \* 469 ] or whether the helm had actually been put \* to starboard.

I will now look to the evidence of another witness. The second mate, who was at the helm, says, upon the sixth interrogatory, "The night was very dark, but not so dark but what we saw the brig

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The Shannon. 1 W. Rob.

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before she struck us. We saw her, I dare say, for five or ten minutes before she came on board of us. The brig was, according to my judgment, the distance of a quarter of a mile or a little better from The Shannon when she was first seen." The same observation which I have already made with respect to the master's evidence, applies also to the testimony of this witness, namely, that he gives the court no clear or distinct information as to what preparations The Shannon had actually made for anchoring at the time. As far as the evidence of those on board The Shannon extends, the fact whether, at the time when The Placidia was first seen, the helm was actually starboarded or not, is left in doubt. In this uncertainty upon the point, I must now, therefore, look to those facts in the case which are distinctly proved and sworn to, and see whether they afford any elucidation of the difficulty caused by the want of direct evidence upon the subject. Now it is proved, beyond all possibility of doubt, that The Shannon carried three lights, and that the light on the larboard side was a red light. Looking to the evidence of those on board the brig, I find this fact distinctly sworn to, namely, that a light was seen, but not a red light. The question naturally arises, why was not the red light seen? The answer must obviously be in one of two alternatives,—either that the brig was greatly to the north of the steamer, or the head of The Shannon had been rounded to at the time, when the brig first saw her. The [ \*470 ] former of these is most clearly disproved in the cause; it therefore follows that the court must embrace the latter alternative, and assume that if a light was seen by the brig, but not a red light, the head of the steamer must have been towards the south; in other words, the helm was starboarded when the brig was first seen by The Shannon.

If this be so, The Shannon is not to blame for any thing that happened afterwards. It is for you, gentlemen, to say, first, whether you think that I have fully and completely stated the points for your consideration; secondly, you are to determine whether such view as I have taken of the facts of the case is founded on reason, looking to the admitted facts in the case, with respect to which, from the want of nautical skill, I can only form a humble conception.

With regard to The Placidia, I confess that I see no reason to impute any blame to her; she had a right to presume that the steamer would have given way; and not knowing the color of the light the steamer carried, she could not, in the darkness of the night, tell the exact position of The Shannon, whether her head was to the north or to the south, so as to have taken timely measures to avoid her. She



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The Gazelle. 1 W. Rob.

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followed the strict rule of navigation, and it appears to me that she pursued a most proper course in following that rule.

*Trinity Masters.* "We are both of opinion that *The Shannon* was not to blame; at the time of the accident she was in the act of anchoring, and for that purpose had brought her head round to the south; nearly the whole of the vessel could be seen from [ \*471 ] *The Placidia*, but the red light was not \*seen, and it could not be seen if the vessel's head was rounded to the south, because the red light would be two points on the lee bow. We are likewise of opinion that it was prudent in the master of *The Shannon* to anchor his vessel, and that the place in question was a proper place for him to anchor in, and that he took the proper measure by putting his helm a-starboard, and rounding to against the strength of the tide. With regard to *The Placidia*, she was not to blame. Her master, as soon as he saw the steamer, took every precaution which is customary, and did all that was proper to be done under the circumstances.

"We are, therefore, of opinion that the accident arose from the darkness of the night alone, and that neither party is to blame."

PER CURIAM.

I dismiss both the actions, leaving each party to pay his own costs.

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### THE GAZELLE, Hurst.<sup>1</sup>

December 16, 1842.

Cause of damage by collision in the river Thames.

Custom of the river pleaded in defence, that all steamers coming up the river against the wind and tide should keep to the south shore.

Damage pronounced for upon the ground that the steamer was in the wrong in not porting her helm, in compliance with the Trinity House regulations.

THIS was a cause of damage by collision, promoted by the owners of the brig *Charles*, against this vessel, her tackle, &c.

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<sup>1</sup> [S. C. 2 Notes of Cases, 39; S. C. on Appeal, 4 Moore; P. C. Rep. 272; Reported on further hearing, 2 W. Rob. 279.]

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The Gazelle. 1 W. Rob.

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The act on petition set forth — That the brig, in the prosecution of a voyage from London to Yarmouth, was proceeding down the river with the ebb tide, under single reefed topsails, single reefed trysail, foresail, and fore-topmast staysail. That on rounding Blackwall Point, on the starboard tack, close-hauled, the wind being south-west by west, the course of the brig was kept towards the southern shore, at a rate of two \* miles and a half per hour. That [ \*472 ] while the said brig was in the upper part of Bugsby's Hole, a steam-vessel's light was perceived on the brig's larboard bow; that the said steam-vessel was coming up the river against the tide with apparently her full power of steam on, taking a northerly course, and rapidly approaching in the track of the brig, whereupon the master of the brig directed the man at the helm to put the brig's helm a-port, which was immediately done. That the steamer was well open on the brig's larboard bow, and there was no obstruction whatever in the reach. That the steamer, although repeatedly hailed by the crew of the brig to port her helm and pass to leeward, paid no attention to such hailing, although there was ample time and opportunity for her to have done so; on the contrary, that the helm of the steamer was put hard a-starboard, and the steamer shortly afterwards came with great violence, stem on, into the larboard bow of the brig, occasioning the damage in question.

On behalf of the steamer it was alleged, that The Gazelle was on her voyage from Hull to London, heavily laden with a valuable cargo and one hundred and seventeen passengers on board. That previous to her arrival in Bugsby's Reach, the wind had veered to west north-west, and then again to west, at which point it was blowing at the time of the accident; that the steamer was proceeding with wind and tide strongly against her, and in consequence thereof was keeping as near to the south shore as the tiers of colliers lying at anchor close along that shore would permit, such being her proper course, as well on account of the deeper water on that shore, and of its being the usual channel for steamers going up the river [ \*473 ] under such circumstances, as also from its leaving the river to the northward two thirds open to vessels running down with the wind and tide (then about half ebb) in their favor. That all the vessels that had passed the said steamer from her entrance into Woolwich Reach had passed in perfect safety, and without any risk of collision, on her starboard side. That the brig, when she was first perceived, was proceeding down the river at the rate of about eight knots an hour, with her two topsails, foresail, and fore and aft mainsail and foretopmast staysail set, and was five or six hundred yards distant, about a point and a half on the steamer's starboard bow, and in

mid-channel. That when within about one hundred yards, the brig ported her helm as if to pass to larboard of the steamer, and was immediately hailed by the master and others of the crew on board the steamer to put her helm a-starboard. That the master at the same moment, as the only means of avoiding a collision, ordered the steamer's engines to be stopped and the paddles to be reversed, which was accordingly done. That the brig, notwithstanding, persisted in keeping her altered course, and struck the starboard side of the steamer's cutwater, &c., &c. That a good look-out was kept on board the steamer, and the accident was occasioned by the fault of the brig in not keeping the mid-channel, which was the proper course, and if she had so done, the collision would have been avoided, &c., &c.

The case was argued before Trinity Masters by

*Haggard* and *Jenner*, for the owners of *The Charles*.

[ \* 474 ] \* *Addams* and *Harding*, for *The Gazelle*.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen, in directing your attention to those facts of the case which are material to the question which you will have to determine, I must in so doing notice an observation which has been much pressed in the argument by the counsel for *The Gazelle*, namely, that the decision in this case must be strictly founded upon the evidence in the cause, and that you are not at liberty to travel out of that evidence in forming your opinion upon the points which will be submitted to your consideration in the present instance.

Now I entirely concur in the propriety of this observation, so far as it is confined to the evidence upon the facts of the case; at the same time, I utterly deny the applicability of the argument, if it is intended to control your judgment by the affidavits of witnesses in the cause, with respect to matters of mere nautical practice and experience. Upon these points it is my duty to inform you that you must be guided solely and entirely by your own science and knowledge, and not by the opinion of other nautical persons, however respectable or numerous such witnesses may be, swearing to a belief that this or that particular course was the proper course to have been adopted. If this were not so, your attendance in this court would be almost nugatory, and, in the great majority of cases that might occur, it would be impossible for the court to arrive at any certain or satisfactory determination. Having stated thus much with respect to the observation in question, I must now request your attention

to the following statement of facts as they are \* disclosed in [ \* 475 ] the respective pleadings, and in the evidence before the court. (The learned judge here adverted at some length to the facts of the case, and observed :) — Upon this statement of facts, the question to be decided, it appears to me, resolves itself into this one point, — was it, or was it not, the duty of the master of The Gazelle to have ported his helm when he first perceived the approach of the other vessel as stated? As far as I am capable of forming an opinion upon these matters, it seems clear to my mind that if the helm of The Gazelle had been ported in the first instance, the collision in question would never have occurred. It seems, moreover, probable, in my view of the subject, that the accident might have been avoided if, even after the period when he had perceived that the helm of The Charles was put to port, the master of The Gazelle had also ported the helm of his own vessel instead of reversing the engines. The ground upon which the master of The Gazelle relies in his justification in not having adopted this course in the present instance is, in substance, this: — that it was not his duty to have done so under the circumstances of the case; or in other words that The Charles was out of her proper course; that she ought to have kept the mid-channel, and that the steamer was following the established rule of navigation in keeping as she did to the southern or Kentish side of the river. It will be for you, gentlemen, to determine how far the usage or rule in question is a rule of universal application, or how far it ought to have been superseded upon the present occasion by the general rule laid down by the board of the Trinity House, that vessels approaching each other, as these two \* vessels were, upon [ \* 476 ] opposite courses, should pass each other on the larboard side. This is the rule of navigation which has been laid down by authority for the regulation of ordinary cases of this kind, and which, in order to secure its efficiency as a guide, must, I apprehend, be a rule of almost universal application. I am by no means prepared to deny that there may exist so peculiar a combination of circumstances as to render the adoption of this rule no longer fitting or expedient. These circumstances, however, should be of a strong and stringent nature; because it is obvious that if every man is to engraft upon it his own exceptions, according to his own views of convenience or advantage, the rule would soon degenerate into no rule at all. It has been suggested in the argument, that the master of The Charles was not on deck at the time of the collision, and that the accident was mainly caused by the confusion and want of proper management which prevailed on board that vessel in consequence. Looking to the evidence before the court, I must say, gentlemen, that I can find

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The Beulah. 1 W. Rob.

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no sufficient proof to establish the averment in question. The proof which has been relied on in its support is confined to the declaration of the witness Brown, against which must be placed the testimony of the master himself, and of six other witnesses, all confirming that the master was on deck. As far, therefore, as this circumstance has any bearing upon the case, it must, I think, be held as proved that the master was on deck. There is also one point which I feel bound to notice, as it has been pressed in argument with the view of influencing your decision, namely, that great neglect and confusion [ \* 477 ] sign prevailed on board The Charles at the time of the collision. Now I must here say, that without giving my opinion as to which vessel was to blame, I am not in any degree satisfied that such neglect is established in the case. It must be remembered, that in accidents of this description much confusion must almost necessarily prevail at the time, and it would be unjust to hold the parties bound by the opinion, which persons may subsequently form, that another and a better course might have been resorted to. With these observations, gentlemen, I will now leave the case in your hands, and you will have the goodness to give me your opinion whether you think that The Charles was to blame in the course she followed in putting her helm to port, or whether The Gazelle was to blame in adopting the measures she pursued in not porting her helm when she first discovered The Charles approaching towards her.

The Trinity Masters were of opinion that The Charles did right in keeping close to the collier section, and that The Gazelle was to blame in not porting her helm.

Damage pronounced for with costs.

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THE BEULAH.<sup>1</sup>

December 20, 1842.

Apportionment of salvage award.

In this case the court was moved to decree an apportionment of a salvage award amongst the owners, master, and crew of the steam-tug Copeland, for services rendered to the vessel The Beulah.

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<sup>1</sup> [S. C. 2 Notes of Cases, 61.]

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The Friends. 1 W. Rob.

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It appeared that the sum of 500*l.* had been \*awarded by [ \*478 ] the court for the service in question, and this sum had been apportioned by the ship-owners' company, to which the steam-tug belonged, according to scale of distribution laid down and adopted by the company in such cases. By this scale, the company (as the owners of The Copeland) took to themselves 415*l.*; the master received 41*l.* 13*s.* 6*d.*; the engineer, 2*l.* per cent. poundage, besides his distribution share; and the stokers and common seamen 4*l.* 15*s.* 3*d.* per man. An act on petition was given in on behalf of four of the seamen, praying the court to make a more equitable allotment.

The court decreed the following apportionment: — To the owners, 415*l.* 0*s.* 5*d.*; to the master 28*l.* 6*s.* 8*d.*; to the first mate 10*l.* 2*s.* 4*d.*; to the engineer 10*l.* 2*s.* 4*d.*; to the second mate 8*l.* 1*s.* 10*d.*; to three seamen 8*l.* 1*s.* 10*d.*; to one apprentice boy 4*l.* 0*s.* 11*d.*

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THE FRIENDS, Ollman.<sup>1</sup>

1842.

Case of collision on the river Thames. Case heard before Trinity Masters. Vessel proceeded against a light vessel going down the river with the wind and tide on the south side of the river. Custom of river pleaded, that a light vessel under the circumstances should keep the mid-channel, and a laden steamer proceeding up the river against wind and tide should keep to the southern or Kentish side. Defence, that the steamer departed from the Trinity House rules in not porting her helm at the time the collision took place. Rule of Trinity House upheld. Vessel proceeded against dismissed with costs.

THIS was a case of collision promoted by the General Steam Navigation Company against the schooner The Friends, &c., &c.

The act on petition in substance pleaded, that about 7 P. M. of the 27th of October, the steam-vessel was proceeding up Half-way Reach, and was just below the Half-way House between Gravesend and London, being at the time on the Kentish side of the river, \*and distant therefrom about one third of the width of the [ \*479 ] river, the night being dark, and the ebb-tide running, with the wind blowing strong from the west. That at such time the schooner Friends was observed coming down the river just open on the starboard bow of the steamer, and distant therefrom about a quarter of a mile, which was as far as a vessel having no light hoisted could have been seen in the darkness of the night. That the steamer had a good look-out, and had two lights hoisted, one very large, with two

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<sup>1</sup> [ S. C. 2 Notes of Cases, 92. Affirmed on appeal, 4 Moore, 314.]

burners at the mast-head, which could be seen at the distance of a mile at least, and the other, which was a smaller light, under the ship's head. That upon perceiving the schooner, the helm of the steamer was immediately put to starboard, and the schooner still continuing to bear down upon the steamer, was still kept a-starboard for the purpose of bringing the steamer as near the shore as possible, and thereby avoiding the collision. That upon the schooner coming within hail, the pilot of the steamer hailed the crew of the schooner to put her helm up, but this direction was not complied with, and the engines of the steamer were thereupon stopped, and in consequence of her helm being a-starboard, the steamer got so near the shore that she went aground. That the helm of the steamer was then ported, but that in consequence of the steamer having taken the ground, it had no effect, and the schooner then struck the steamer amidship, abaft the starboard paddle-box, and doing the damage in question, &c., &c.

On behalf of The Friends it was pleaded: That the wind was to west and by south, and the night starlight, and that the [ \* 480 ] schooner was at the time \* proceeding down the river in ballast for Erith. That she was under her foresail, topsail, topgallant-sail, foretopmast-stay-sail, and mainsail, and with all hands on deck, keeping a good look-out; her course was southward of the mid-channel, the tide having recently turned and running down. That when the lights of the steamer were first perceived from their position, they showed that the steamer's head was inclined to the northward. That as the steamer rounded the point above Half-way House, she opened upon the schooner's larboard bow, the vessels then being at the distance of about a quarter of a mile from each other. That the schooner's course was thereupon slightly altered by steering her more towards the south shore, and upon rounding the point, the steamer's course, which had before been to the northward, was suddenly altered by putting the helm a-starboard, upon which the helm of the schooner was put still more a-port, so that she approached within a very short distance of the south shore, her course having previously been between the south shore and the mid-channel. That the steamer was repeatedly hailed to port her helm, and some person on board the steamer called out to the schooner in reply to starboard her helm. That in order to lighten the force of the collision, but when the respective vessels were too near to avoid a collision, the helm of the schooner was put a-starboard, and the peak halyards and the main sheet were let go, and immediately afterwards the steamer ran into the schooner, the funnel chain of the former catching the bowsprit of the latter, carrying away the schooner's cutwater and apron, and doing her other considerable damage. The schooner, [ \* 481 ] in porting her helm and \* steering towards the south shore,

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The Friends. 1 W. Rob.

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acted in compliance with the instructions of the elder brethren of the Trinity House, that when there is risk of a collision, vessels should pass each other on the larboard side, and that the accident was solely and entirely occasioned by the fault and misconduct of the persons on board the steamer, &c., &c. The case was heard before Trinity Masters, and was argued by

*Addams* and *Robinson*, for the steam-vessel.

*Queen's Advocate* and *Haggard*, for the schooner *Friends*.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge having adverted to the facts of the case, proceeded to observe to the following effect:—"Upon the facts of the case, as stated, there is no material contradiction or dispute in the present instance. One point of difference between the two parties is as to the exact locality, and even this is very slight. There is also a trifling difference as to the direction of the wind. The evidence for *The Menai* makes it to have blown from the west, whilst the witnesses for *The Friends* assert that it was west by south. The only other point in controversy is as to the position of the steamer when she was first descried by *The Friends*. It is represented in the reply to the act on petition in these words:—"That lights were observed in the Half-way Reach, the position of which showed that the steamer's head was inclined to the northward, and as she rounded the point, they opened on the schooner's larboard bow." This statement is denied on the other side, and it is averred in [\*482] contradiction, that 'the steamer, to avoid the tide, was steering towards the said point, on the south side of the river, and that at the time the schooner ran into her, the steamer had not rounded the point, but was aground between the point and the Half-way House.' These are the controverted facts in the case, and it is obvious that they cannot materially affect the conclusion of the cause, because it is clear that the two vessels were so far approaching each other in a direct line, that it was the duty of each to take proper measures to avoid a collision. In my judgment, then, the true question comes to this—whether, under the circumstances disclosed, *The Menai* did right or wrong in starboarding her helm? and this question, I think, is not altered by the difference in the respective statements to which I have adverted.

"Let us now look to the rules prescribed by the board of the Trinity House for the guidance of vessels, and in applying these rules, in order to do perfect justice to *The Menai*, I will assume that the wind blew from the west. What then are the rules in question?



Secondly, what their applicability? Finally, how far do the circumstances of the case constitute an exception to the application of these rules in the present case? Now the document that I hold in my hand (the Trinity House regulations) first states certain recognized rules which have long prevailed. It does not purport to enact them, but to state them as established rules; secondly, it states what ought to be considered in regard to the power and condition of steamers; and it then purports to provide rules for cases when steamers are meeting other steamers and sailing vessels going large. As it [ \* 483 ] is very important to understand the \* whole substance of this document, I will read the very words in which it is drawn up.<sup>1</sup> It commences by reciting, that 'Whereas the recognized rule for sailing vessels is, that those having the wind fair should give way to those on a wind; that when both are going by the wind, the vessel on the starboard tack shall keep the wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand; that when both vessels shall have the wind large or a-beam and meet, they shall pass each other in the same way on the larboard hand; to effect which two last-mentioned objects, the helm must be put to port.'

"It is to be noticed that the paragraphs to which I have thus far referred, provide only for the cases of two sailing vessels meeting each other, and if this was not a case where one of the vessels was a steamer, taking the wind to be either from the west or the south-west, the schooner Friends would have had the wind free, and The Menai, supposing she had been a sailing vessel, would have been close-hauled. But The Menai was a steamer; in what light, then, are we to consider her in relation to the wind and her course of sailing? The answer is supplied by the paragraph that immediately follows:— 'And as steam-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on either tack, it becomes only necessary to provide a rule for their observance when meeting other steamers, or sailing vessels going large.' If the document had stopped here, I should have said that it established this, 'that a steam-vessel was always to be considered as a vessel navigating with a fair wind,' and this point being taken in conjunction with the previous paragraph, [ \* 484 ] which \* states, that when two vessels have the wind large, and meet, each vessel is to pass on the larboard hand, it would, without doubt, have led, in the present case, to the conclusion, that The Menai, in putting her helm a-starboard, had acted, not perhaps in violation of a direct rule, but of a fair inference to be drawn from the Trinity House regulations. But the document does not

<sup>1</sup> [It is recited at large, *post*, p. 488.]

stop here: it goes on to define the rule for steamers meeting other steamers, and vessels going large; and looking at the rule itself, I am bound to say that it does not precisely carry out the intention for which it purports to be framed. It is drawn up in these words: 'When steam-vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm to port, so as always to pass on the larboard side of each other.' This paragraph, it is obvious, is exclusively confined to the case of steam-vessels meeting each other on different courses, and consequently it does not apply to the present case. Then follow these words:— 'A steam-vessel passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand.' Mark the expression, *another vessel*, not *other vessels*. Now giving a strict and legal construction to the words of these two paragraphs, I cannot in my judicial conscience say that they provide for the case which they purport to embrace, namely, the case of steam-vessels meeting other sailing vessels going large. Consequently, if taken *per se*, I should be bound to hold that they would not in strictness apply to the circumstances of the particular case under consideration. But it does not appear to me that I should be justified in so limiting the interpretation of the paragraphs. I \* must consider them [ \* 485 ] in reference with what has gone before; and connecting them with the paragraphs to which I have already adverted, I may fairly say, that by inevitable inference, the present case is sufficiently brought within their effect: for when I am told that two vessels, both going free, are to pass each other on the larboard hand, and am also told that steamers are always to be considered as vessels going free, it necessarily follows, that the circumstances of this particular case are within the scope and meaning of the two paragraphs. I think, therefore, that unless some exception is to be ingrafted upon these rules, the rule does apply, and that The Menai was *primâ facie* to blame in putting her helm to starboard.

"It must next be considered whether the rule is susceptible of any exception at all, and if so, whether the circumstances stated on behalf of The Menai furnish a fair exception in the present instance. Now I am certainly of opinion that there may be, and, indeed, must be, exceptions, and this is apparent to common sense, as in the case of a vessel going so near to a rock or a shoal of sand, that if she followed the rule, she would inevitably become a wreck: no person would say the rule was to prevail over the still higher consideration of the preservation of property or of human life. The question then arises, whether the case furnishes a fair exception to the rule or not? I will

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The Friends. 1 W. Rob.

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state what the exception contended for is. It is very well stated in the affidavit of Knight, the licensed Trinity pilot. He says, 'It is the invariable rule and practice adopted by all classes of vessels navigating rivers, to take every advantage of the tide which the localities of such rivers may afford: that in conformity with such rule [ \*486 ] and practice, vessels going with the \*tide down the river

Thames, keep in mid-channel for the purpose of getting the benefit of the tide, and vessels coming up the said river against the tide, keep as near as may be to one or other of the shores, and when so coming up the river in Half-way Reach, by reason of the ebb tide then setting towards the north or Essex shore, keep on the south or Kentish side, for the purpose of avoiding as much as possible the strength of the tide.' Upon what considerations, then, is the exception founded? Upon two, and two only, — first, on alleged usage or custom in the river Thames; secondly, the convenience which is stated to result to all classes of vessels navigating up or down the river by continuing to follow that usage, although it be in opposition to the rules and directions of the Trinity House. It will be for you, gentlemen, to determine whether the convenience of this asserted custom furnishes a satisfactory exception to the application of your own rules upon the present occasion. I cannot pretend to form an accurate judgment either as to the extent of the custom *itself*, or the advantage or convenience to be derived from it. Upon these points I must be guided by your professional skill and experience. All I can say is this, — if you are about to make an exception to your own rules, an exception which is not to be extracted from any thing to be found in the rules themselves, but to be founded upon the reasons which have been alleged, for the sake of the safe navigation of the river Thames, and the great interests which are daily and hourly there at stake, let your exception be clear, definite, and intelligible, in order that it may, at the first glance, be known to the mercantile and maritime world. If, instead of a clear and direct rule, there is [ \*487 ] to be any exception, let it be as distinct and definite \*as the rule itself: unless it be so, it is obvious that persons in all cases will endeavor to form exceptions for themselves, and, instead of certainty, we shall have uncertainty; instead of security, we shall have danger. As the question to be decided is of such great importance, I request you to take it into your serious consideration, and to give me the benefit of your opinion upon the next court day."

Upon the subsequent court day, January 24th, the Trinity Masters having delivered their opinion that *The Menai* was to blame, and that the schooner *Friends* pursued the proper rules of navigation, the court pronounced against the claim of *The Menai*, and dismissed the other parties with their costs.

## TRINITY HOUSE REGULATIONS

REFERRED TO IN THE JUDGMENT OF THE COURT.

## NAVIGATION OF STEAM-VESSELS.

TRINITY HOUSE, LONDON, }  
30th October, 1840. }

THE attention of this corporation having been directed to the numerous, severe, and in some instances fatal accidents, which have resulted from the collision of vessels navigated by steam; and it appearing to be indispensably necessary, in order to guard against the recurrence of similar calamities, that a regulation should be established for the guidance and government of persons intrusted with the charge of such vessels; and,

Whereas the recognized rule for sailing vessels is, that those having the wind fair, shall give way to those on a wind:—

That when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand:—

That when both vessels have the wind large or a-beam, and meet, they shall pass each other in the same way on the larboard hand, to effect which two last-mentioned objects the helm must be put to port:—

And as steam-vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on a wind on \* either tack, it becomes only necessary [ \* 489 ] to provide a rule for their observance, when meeting other steamers or sailing vessels going large.

Under these considerations, and with the object before stated, this board has deemed it right to frame and promulgate the following rule, which, on communication with the Lords Commissioners of the Admiralty, the elder brethren find has been already adopted in respect of steam-vessels in her Majesty's service, and they desire earnestly to

impress upon the minds of all persons having charge of steam-vessels, the propriety and urgent necessity of a strict adherence thereto, namely :

RULE.

When steam-vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming in collision, each vessel shall put her helm. to port, so as always to pass on the larboard side of each other.

A steam-vessel passing another in a narrow channel, must always leave the vessel she is passing on the larboard hand.

By Order,

J. HERBERT, *Secretary.*

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